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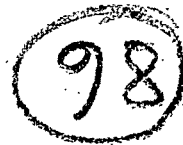
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Preface

The Annual Meeting is the centerpiece in the program of the American Society of International Law. And, as is perfectly evident from what follows in this volume, the Chairman of the 1973 meeting, Professor Tom S. Farer of the Rutgers Law School, took the institution to new heights this year. The dozen-odd panel programs, the working breakfasts and lunches, the Philip C. Jessup International Law Moot Court Competition, and the remarks at the Annual Dinner—are a remarkable review of the contemporary issues and personalities on the international law scene. These 1973 Proceedings are a testimony to his keen judgment in the selection of chairmen, speakers, and commentators. To them, and to him, as well as to the reporters and staff members of the Society, we owe our gratitude.

Particular thanks are also due to Anne Simons, and to all those who have given her a hand in editing this vast body of material into a usable and useful record.

WILLIAM D. ROGERS
President

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THE APPLICABILITY OF THE PRINCIPLE OF
SELF-DETERMINATION TO UNINTEGRATED
TERRITORIES OF THE UNITED STATES:

THE CASES OF PUERTO RICO AND THE TRUST
TERRITORY OF THE PACIFIC ISLANDS

The panel convened at 10:30 a.m., April 12, 1973, under the chairmanship of Sir James Plimsoll, Australian Ambassador to the United States.

THE EVOLUTION OF THE "AMERICAN EMPIRE"

*by José A. Cabranes**

Today, the anniversary of the death of Franklin Roosevelt, is especially appropriate for a discussion of the political evolution of two territories whose development, before and after his death, was shaped by Roosevelt's enlightened vision of world public order. The Trust Territory of the Pacific Islands (TTPI) was an inheritance of a war waged by the United States in affirmation of "the right of all peoples to choose the form of government under which they live." Puerto Rico's progressive dismantlement of colonial government had its origins in the New Deal. It was furthered by Roosevelt's support of Puerto Rico's Popular Democratic Party and a policy favoring self-determination and decolonization entrusted by Roosevelt to a succession of sympathetic and imaginative administrators. Both territories emerged in the postwar period as natural objects of the concern of the world community which Roosevelt helped to organize.

Following the war in which they played such a prominent role, the small islands of Micronesia moved from the status of a class "C" mandate of the League of Nations under Japanese administration to that of a "strategic trusteeship" of the United Nations under U.S. administration. The Charter, like the Covenant of the League of Nations, adopted the principle of international accountability by administering powers for the well-being and development of peoples which the Covenant had quaintly described as "not yet able to stand by themselves under the strenuous conditions of the modern world." Chapters XII and XIII of the Charter entrusted the development of the peoples of the TTPI to the administering power under the supervisory machinery of the Trusteeship Council and the Security Council of the world organization.

With respect to dependent territories other than those falling within the International Trusteeship System—such as Puerto Rico—Chapter XI of the Charter (the Declaration Regarding Non-Self-Governing Territories) imposed upon member states, "as a sacred trust," the obligation

* Rutgers University, Newark School of Law.

to promote to the utmost the well-being of colonial peoples. To this end, members of the United Nations were obligated to develop self-government in non-self-governing territories "according to the particular circumstances of each territory and its peoples and their varying stages of development."

What, if anything, do these disparate territories have in common? What, if anything, can each learn from the other's experience as an area under American administration?

The singular contribution of Puerto Rico to the developing international law of self-determination is the principle of "free association." This idea is reflected in the Spanish version of Puerto Rico's constitutional name: *el Estado Libre Asociado de Puerto Rico* (the Free Associated State of Puerto Rico.) The English-language version—the *Commonwealth* of Puerto Rico—is more confusing. "Free Associated State" is a preferable term, in both Spanish and English, because it is less ambiguous than the word "Commonwealth" and properly suggests the essential attributes of Puerto Rico's current political status: a state which is associated with—connected to—the United States but is not a part of the United States; and a state whose association is based upon the basic principle of consent by the Puerto Rican people.

The Free Associated State of Puerto Rico was proclaimed on July 25, 1952. After the organization of a government pursuant to a constitution of their own choosing, the people of Puerto Rico have remained connected to the American political system by applicable provisions of the U.S. Constitution and by a congressional statute known as the Puerto Rican Federal Relations Act. This connection or relationship is said to have been created "in the nature of a compact" between Puerto Rico and the United States embodied in the Federal Act. That compact, in turn, specifically provides that all statutory laws of the United States shall have "the same force and effect in Puerto Rico as in the United States," unless deemed inapplicable to Puerto Rico. Therefore, for Puerto Rico, whether a particular congressional enactment will or will not be applicable to it remains a constant source of preoccupation. This unusual arrangement between a dependent people and a wealthy and powerful metropolitan state has been repeatedly endorsed by the people of Puerto Rico in general elections and in a special plebiscite on political status held in 1967.

According to a monograph by the United Nations Institute for Training and Research (UNITAR), the idea of "free association" has been adopted by no less than nine small territories and is now under active consideration in the TTPI. By 1960 "free association" as an intermediate status between national independence and full and equal integration had found its way into the lexicon of UN practice. In that year, the General Assembly revised its statement of principles or "factors" indicative of whether or not a given territory has attained "a full measure of self-government" (Resolution 1541 (XV), December 15, 1960). Under these new guidelines, "free association with an independent State" requires a "free and

voluntary choice" by the people of the territory "expressed through informed and democratic processes." Furthermore, the people of the territory must reserve the "freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes."

The establishment of the Free Associated State in 1952 was hailed by its architects as the end of Puerto Rico's colonial relationship to the United States. This view was confirmed by the UN General Assembly in 1953, when it accepted the position of the U.S. delegation that Puerto Rico's status of free association constituted the attainment of what the Charter calls "a full measure of self-government." As a result of that action, the United States discontinued submission of reports on Puerto Rico as required of states which administer "non-self-governing" territories. Nevertheless, advocates of Puerto Rico's integration into the American Union and proponents of national independence have continued to argue that the Free Associated State is merely a camouflage for the island's "colonial" status. Pro-independence groups repeatedly have petitioned diverse organs of the United Nations, most notably the General Assembly's Special Committee on Colonialism—the "Committee of 24") for a review of the case of Puerto Rico and its restoration to the list of territories covered by Chapter XI of the Charter and the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (Resolution 1514 (XV), December 14, 1960). On August 28, 1972, the Committee of 24 adopted a resolution recognizing "the inalienable right of the people of Puerto Rico to self-determination and independence," and instructed a working group to report on the procedure which the Committee should follow with respect to Puerto Rico in the implementation of the 1960 Declaration.

One territory in which Puerto Rico's idea of "free association" has had considerable importance and influence between 1952 and the present is the TTPI. In 1966, the Congress of Micronesia asked the President of the United States to appoint a commission to study "the political alternatives open to Micronesia." The President turned the request over to Congress, which took no action on the matter. In 1967, Micronesia established its own commission, the Future Political Status Commission of the TTPI. Significantly, when two leaders of the TTPI Commission travelled to the United States at the outset of their status negotiations, they visited not only the United Nations (which supervises the U.S. administration of the TTPI), but also the Free Associated State of Puerto Rico and the American territory of the Virgin Islands.

In 1969, the TTPI Commission recommended that the TTPI should be "a self-governing state" with "Micronesian control of all its branches" and should "negotiate entry into free association with the United States." If this proposal proved impossible to implement, the Commission concluded that complete independence would be the only viable alternative. Following this report six rounds of discussions were held on the future political status of the TTPI between the TTPI Political Status Delegation

and a U.S. delegation headed by a special presidential envoy. These talks have included diverse initiatives in the direction of a "compact of free association" and, most recently, independence.

The compact of free association, currently under discussion between the United States and the TTPI, has some elements in common with Puerto Rico's compact. Both envisage a relationship based upon mutual consent. Both contemplate the right of the affected peoples to adopt and alter their own constitution and full U.S. responsibility and authority over matters relating to foreign affairs and national defense. Some differences between the two are notable. First of all, unlike the Puerto Rican compact, the TTPI compact will be, in every sense of the term, an *international* agreement. If adopted by the TTPI and the U.S. Government, the compact will become effective only after approval by the UN Trusteeship Council and the Security Council. Future problems of construction and interpretation presumably will be resolved not in the U.S. domestic arena, but in appropriate international forums. Moreover, the people of the TTPI already are the objects of concern of a substantial international apparatus and may directly appear before the Trusteeship Council. Under the Trusteeship Agreement, the Trust Territory Government may accept membership in international organizations and engage in forms of international cooperation. It has actively undertaken such roles in a number of regional international organizations. The degree of "international personality" possessed today by the TTPI is already immeasurably greater than that possessed by Puerto Rico, which has been classified by Professor Charles G. Fenwick among the territories "possessing so intangible a degree of international personality as to reach almost a vanishing point." In contrast to the case of the TTPI, where the UN jurisdiction is clear and undisputed, the jurisdiction of the United Nations over Puerto Rico is very much in dispute. The United States has never recognized the jurisdiction of the General Assembly or its subsidiary committees to pass upon the value or lawfulness of Puerto Rico's political status. In the U.S. view, questions concerning this status may be discussed and resolved only within political and judicial systems of the United States. With minor and inconsequential exceptions, Puerto Rico has not participated in international organizations. In comparison with the easy access of the 100,000 people of Micronesia to UN organs, the Government of the Free Associated State of Puerto Rico, representing three million people in a rapidly developing and highly sophisticated society, has no institutionalized means through which to defend itself from attack in the international arena, lacking even a representative or designee on the U.S. delegation to the United Nations. Indeed, it has less effective access to international organizations than those dissident groups within Puerto Rico who instigate attacks at the United Nations upon the Free Associated State.

The draft TTPI compact suggests possible areas for the growth and development of Puerto Rico's form of free association:

(1.) Under free association, the Government of Micronesia may seek associate or other membership for which it may be eligible in regional

international organizations and UN Specialized Agencies or subsidiary bodies of which the United States is a member. The U.S. Government would "give sympathetic consideration" to requests from the Government of Micronesia to apply for membership in other organizations of which the United States is not a member.

(2.) The Government of Micronesia may in its own name negotiate and conclude with international organizations of which it may be a member agreements of a cultural, educational, financial, scientific, or technical nature that apply only to Micronesia.

(3.) The Government of Micronesia may establish temporary or permanent representation of trade or other commercial interests in foreign countries and accept such representation in Micronesia.

These possibilities for autonomous action by Micronesia in the international community contemplate consultation between it and the U.S. with respect to all matters of mutual concern. The United States retains an effective veto power over any activity of the government of Micronesia which might conflict with the international commitments, responsibilities, or policies of the United States.

These proposals, fully endorsed by the U.S. Government, underscore the genuine commitment of the people and Government of the United States to the development of a compact of association which adequately protects the interests of the people of the TTPI without jeopardizing the international position of the United States.

For Puerto Rico, which now seeks to develop its own political status consistent with its form of association with the United States, the above indicates practical possibilities available to a people with the willingness to assert its legitimate political interests. By analogy with the proposed TTPI compact of association, various alternatives are already open to the Governments of the Free Associated State of Puerto Rico and the United States which require no substantial or prolonged constitutional or legislative action.

(1.) Puerto Rico's participation in the foreign relations of the United States, especially in areas vitally affecting Puerto Rican interests, might be institutionalized by executive or administrative regulations requiring that, in appropriate cases, a designee of the Government of the Free Association State be named to U.S. delegations to international organizations and specialized conferences. Is it not absurd that there exists no formal, institutional mechanism whereby the Free Associated State through a designee sitting on the U.S. delegation may properly defend itself from attack in the United Nations? Is it not clear that the United States and Puerto Rico have a common interest in defense of their compact of association? Moreover, delegations to specialized conferences, for example, on the law of the sea or on international trade and investment questions, invariably include representatives of *private* special interest groups in the United States. They should certainly be able to accommodate a representative of the *public* interests of the three million U.S. citizens of Puerto Rico. This is true of other areas of international concern in

which the Free Associated State has a special interest, including oil, petrochemical, and energy questions; the economic development of the Caribbean region; and technical assistance programs in the developing states.

(2.) The Free Associated State might become a member or an observer at UN Specialized Agencies (such as WHO, FAO, and ILO). It might also become a Permanent Observer at the Organization of American States. As in the case of Micronesia's draft Compact of Association, such arrangements might include the retention by the U.S. Government of an effective veto power over any activity by the Government of the Free Associated State which is likely to conflict with the international commitments, responsibilities, or policies of the United States.

Permanent Observer status at the OAS offers unusual opportunities for Puerto Rico's direct collaboration in matters not affecting U.S. foreign and defense policies. In April 1971, the General Assembly of the OAS established by resolution the status of Permanent Observer in order "to promote cooperative relations" with American states that are not members of the OAS (such as Canada and Guyana) and non-American states that participate in programs of the Organization. Puerto Rico's role as a Permanent Observer would be less consequential than the outright membership in such regional arrangements envisaged by the TTPI compact. Observer status in international organizations is not, of course, synonymous or comparable with the membership possibilities afforded by the draft TTPI compact. Observer status does, however, afford "mini-states" and associated states an opportunity to play a limited role in the world community without incurring the burdens and obligations of membership, without affecting the tone and structure of the international organizations concerned, and without impairing the predominant role of a member state in the direction of the foreign and defense policies of an associated state.

Seven non-American states now enjoy Permanent Observer status at the OAS (Belgium, France, Germany, Holland, Israel, Italy, and Spain). Even Japan is considering applying for Observer status. If these distant states have enough interest in the affairs of the Western Hemisphere to merit the status of Permanent Observers to the OAS, certainly Puerto Rico should enjoy a comparable status. Indeed, if Monaco has a sufficient interest in the world community to maintain an Observer Mission at the United Nations, certainly a Free Associated State which is the subject of considerable debate and attention at the United Nations should at least have access to the Organization's sessions, corridors, and lounges. The Secretary-General of the United Nations has suggested that Observer status may be a solution to the so-called "mini-state" question. Might it not also be a vehicle for the participation in world affairs of a technologically advanced associated state of three million people?

In conclusion, Puerto Rico and the TTPI possess the political resources and the creative statesmanship to develop a special form of self-government. In turn, the United States has demonstrated its good will

and genuine interest in the fulfillment of the expectations of peoples for whom it has assumed a "sacred trust." It is important that the people of the TTPI and Puerto Rico recognize the U.S. commitment to the principles of the UN Charter and, in particular, to the principle of self-determination. But self-determination, in the last analysis, requires a clear definition of *self*. It requires that a people know and identify their own interests. It further requires that a people be prepared to assert their claims forcefully.

Since the Roosevelt era, the United States has never attempted to frustrate the freely expressed wishes of the dependent peoples under its flag. Only a failure of will or a loss of nerve can prevent the peoples of these two territories from developing their respective compacts of free association in a manner fully consistent with the aspirations of their peoples.

SELF-DETERMINATION IN PUERTO RICO

*By Jaime Benítez**

As a form of government the *Estado Libre Asociado*, or to use the English title the Commonwealth of Puerto Rico, reflects a cultural, economic, social, political process of long duration. It also embodies an explicit program of political pioneering initiated after the end of World War II.

Historically, the quest for an autonomous polity, united to a much larger metropolitan power to which the Puerto Rican community relates affectionately, as well as in common interests, citizenship, vicinity and joint achievements, goes back to the foundation of the Autonomist Party in 1887. In 1948 the Popular Democratic Party (then as now the majority party in Puerto Rico), searching for a way out of the two dead-end alternatives of integration or separation, proposed building a new political reality: a lasting association with the United States to be established along mutually acceptable lines.

The 1948 date is highly significant. The Popular Democratic Party, founded in 1938 by a great charismatic leader, Luis Muñoz Marín, had formulated an all-encompassing program of social reform. It promised to tackle the problems of destitution, unemployment, ignorance, and human injustices besetting "the real human being of flesh and bones who lives and dies in Puerto Rico" and to use the electoral process to that purpose. To sidestep the divisive issue of political status, the PDP pledged a moratorium on ultimate political goals. In the 1940 elections the PDP scored an unexpected but indecisive victory. After a highly successful if controversial administration that victory was rendered complete in the elections of 1944.

In cooperation with the last American Governor, the brilliant New

* Resident Commissioner of Puerto Rico.

Deal planner, Rexford G. Tugwell (1941-1946), with the full support of Presidents Franklin D. Roosevelt and Harry S. Truman, and with the enthusiastic backing of the Puerto Rican electorate, Muñoz Marín and his followers as well as an extraordinary team of competent and devoted administrators initiated a broad social, industrial, educational, and governmental reconstruction. It was pursued unflinchingly and progressively. The war itself permitted the accumulation of capital as well as emergency measures which in turn facilitated new departures from traditional patterns.

The 1948 general elections were the first to be held after the war and the pledge concerning ultimate political goals was no longer tenable. The colonial system was in process of liquidation everywhere.

Puerto Rico found itself in a paradoxical situation, in many ways in the exact opposite condition of communities in the Near East, the Far East, and Africa which were emerging from a colonial status. It also differed from the large majority of the communities in Latin America. In standards of living, trained manpower, human opportunities, social, cultural, educational, and economic development, and democratic procedures, Puerto Rico found itself much ahead and in fact at a completely different level from all the societies that later were to be identified as the Third World.

Furthermore, within a structure which technically and juridically could be called colonial, Puerto Rico had in fact achieved a higher stage of social development than that prevailing in many of the so-called independent nations. It was engaged in a process of internal decolonization normally regarded by colonies as a goal to be pursued after separation from the metropolis. What economic analysts were to call the *take off period* had already taken place in Puerto Rico. The upward spiral in Puerto Rico's economy was feasible basically because of our exceptional relationship with the United States. The task ahead for Puerto Rico was to retain, safeguard, and enhance those exceptional conditions and at the same time achieve political autonomy. What are those exceptional conditions?

(1.) The basic social, civic, economic, and educational rights of American citizenship as they are backed-up by federal resources, federal legislation, and federal courts.

(2.) The rights and duties of common defense with the stability and the solidarities inherent in such common responsibility.

(3.) The free access of Puerto Ricans to mainland job opportunities and the free access of Puerto Rican goods to mainland marketing opportunities.

(4.) A federal tax free zone, created by the Jones Act of 1917, which excluded Puerto Rico from direct federal taxation and facilitated necessary industrial development in Puerto Rico.

(5.) Provision, also in the Jones Act, that "all taxes collected under the internal-revenue laws of the United States on articles produced in

Puerto Rico and transported to the United States, or consumed in the island shall be covered into the treasury of Puerto Rico."

(6.) Refunding provisions concerning income derived from tariff duties on articles imported into Puerto Rico.

All of these conditions were highly favorable to Puerto Rico and had become inextricably interwoven in the fabric of Puerto Rican life. Under statehood some would be lost; under independence others would be lost. It was essential for Puerto Rico to retain them all for they were indispensable for Puerto Rico's continued growth and development and for the furtherance of its own cultural and political autonomy. Obviously a perfect symbiosis could not be achieved, but basic directives towards these objectives could be formulated. The PDP took such a program directly to the electorate.

Following an overwhelming victory at the polls, Governor Luis Muñoz Marín and Resident Commissioner Antonio Fernós Isern, as principal leaders of the Popular Party, took their proposals to President Truman and to the leaders of the U.S. Congress. Approval of the basic ideas was finally enacted "in the nature of a compact" in Public Law 600, signed by the President on July 3, 1950.

Public Law 600 required previous approval by the people of Puerto Rico in a referendum which was held June 4, 1951. The law was accepted by a vote of 387,016 for to 119,169 against. Subsequently delegates to a Constitutional Convention were elected in August 1951. The Convention recessed after approving the Constitution of Puerto Rico in February 1952, which was further approved by the electorate in a referendum held March 3, 1952 by a vote of 374,649 to 82,923. The U.S. Congress accepted the Constitution through a second public law involving an inconsequential modification, which the Constitutional Convention accepted. On July 25, 1952 Governor Muñoz Marín proclaimed the Constitution:

... which a democratic and great-hearted people have forged for themselves and by which they have attained their political majority in the form of the Commonwealth of Puerto Rico.

The opportunity for self-determination for and against Commonwealth is built into the Commonwealth system. Puerto Rico has repeatedly asserted its self-determination in favor of Commonwealth status. Two referenda and a Constitutional Convention were preconditions to its establishment. After Commonwealth, all the general elections (6) which have been conducted regularly every four years have reaffirmed the validity of the basic principles of Commonwealth.

The results of the latest general election are particularly significant. On November 7, 1972 the electorate, including for the first time all persons 18 years old and over, returned the PDP to office by a decisive majority. In 1968 the New Progressive or Statehood Party had won the governorship, the House of Representatives, and the Resident Com-

missioner by a plurality of votes after pledging themselves to pursue a program of administrative and economic reforms and to respect Commonwealth. In the 1972 elections the PDP claimed that the Statehood or New Progressive Party had violated its pledge. The defense of the Commonwealth status and its advancement was one of the main issues put forward by the PDP. The Independence Party called for an all out participation. There were no abstentions or boycotts; 85% of the electorate participated. On the straight party ticket vote the returns were as follows:

PDP (Pro Commonwealth)	609,670
PNP (Pro Statehood)	524,039
PIP (Pro Independence)	52,070
All other parties	4,940
<hr/>	
Total	1,190,719

Aside from the "daily plebiscite" of living together in peace, progress, and social solidarity, (which Ernest Renan describes as the ultimate test of the collective will) and in addition to the electoral evidence already mentioned, self-determination was also directly and specifically exercised on July 23, 1967 when Puerto Rico held a plebiscite on the precise issue of Commonwealth, Statehood, or Independence. Over 60% of the voters cast their ballots in favor of the Commonwealth. The Plebiscite Act and the ballot provided that a vote for Commonwealth involved:

The reaffirmation of the Commonwealth . . . as an autonomous community permanently associated with the United States and for the development of Commonwealth to a maximum of self-government compatible with a common defense, a common market, a common currency and the indissoluble link of the citizenship of the United States.

Commonwealth status is open ended; it is neither static nor perfect but a continuing process. It provides the people of Puerto Rico with a flexible political structure within which their spiritual, social, economic, and personal life may continue to advance in civilized, livable, worthwhile, and meaningful ways. The great majority holds that these objectives can be achieved best in Puerto Rico and for Puerto Ricans with an autonomous society united in free, voluntary, fruitful, and permanent association with the United States.

The ultimate validation of Commonwealth is that it safeguards and advances the fulfillment of human rights, the full exercise of political freedoms; the public responsibility for economic development, the commitment to social justice, and the orderly change of laws, institutions, and structures through effective use of the democratic process; through that democratic process Puerto Rico has created and established its own chosen and preferred form of government. It is a form of government that maintains the frontier personality, avoids the pitfalls of nationalism,

keeps options of improvement open, and facilitates the living together of persons with diverging political aspirations.

Are the people of Puerto Rico to be told that what they have proudly endorsed as "Puerto Rico's own contribution to the struggle of man to achieve freedom, dignity and self-fulfillment in the Caribbean, based on the principles of autonomy, social interdependence and self-determination" is to be dismissed as being below standards and achievements supposedly prevailing in one hundred and thirty other communities? If so, on what evidence?

Political relationships and structures are unsatisfactory the world over. Many, if not all, of them rest upon assumptions and premises that have been rendered grossly defective by science, technology, and interlocking economies as well as overflowing populations and shifting values. A sadder, and not particularly wiser, mankind approaches the end of the 20th century without adequate political instruments through which to channel, foster, and protect the values of human solidarity, tolerance of differences, and political responsibility in a shrinking world.

Perhaps the greatest theoretical merit of the architects of Commonwealth lies in their valiant effort to work out a political status which would fit the needs and aspirations of the people of Puerto Rico rather than have such needs and aspirations forced into preordained forms of political status which for Puerto Rico would be crippling and unacceptable.

Those of us who represent Commonwealth are fully aware of its shortcomings. We are committed to a program that would extend its range of responsibilities and would effect a more perfect union with the United States. We are committed further to accomplish these additional goals during the term of our responsibility in the same spirit of mutual understanding and trust that has distinguished our previous achievements. Therefore we are glad to discuss the values and limitations of Commonwealth at any and all academic, international, cultural or professional levels. At the same time there is only one political forum authorized to make changes and to pass judgment upon Commonwealth. That forum which has heretofore expressed its full endorsement of the principles of Commonwealth is constituted by the people of Puerto Rico.

SELF-DETERMINATION AND INDEPENDENCE: THE CASE OF PUERTO RICO

*by Ruben Berrios Martinez**

One of the fundamental objectives that has guided international society during the last twenty to twenty-five years has been the quest for self-determination for all peoples. For many former colonies, the principle of self-determination has already been fulfilled through the acquisition

* Senator, and President of the Puerto Rican Independence Party.

of national independence. For others, self-determination has been delayed, due in large part, to the balance of conflicting forces that have prevailed within international society during this same period of time. But the present interaction of these political and economic forces and their juridical effects at the international level have brought to the surface new expectations for those who still struggle to free themselves from colonialism.

As regards self-determination, the task of the international jurist is much simpler than that of the liberation forces. Were it not for the fact that the influence of this Society extends far beyond the juridical sphere and very deep into the political realm, I would not be here in Washington speaking to you. Dissertations are not enough to bring colonialism to an end. If the realm of law is anywhere close to the realm of justice, I know some of you will help in the just cause of Puerto Rican independence.

The juridical contradiction: In 1953, the UN General Assembly, then controlled by the colonial powers, approved a series of resolutions by virtue of which the United Nations relieved the United States from the obligation of submitting information under Article 73(e) of the Charter regarding the territory of Puerto Rico. It was supposedly determined at that time that through the establishment of the "Commonwealth" of Puerto Rico in 1952, our nation had ceased to be a colony of the United States. But twenty years later in 1972, the General Assembly approved a report of its Special Committee on Decolonization under which the Committee, recognizing the colonial condition of Puerto Rico, ordered a report on the procedure to be followed on the implementation of the Declaration on the Granting of Independence to Colonial Countries.

Undoubtedly, only a profound change in the political composition and expectations of the United Nations during these twenty years can explain this apparent contradiction. It is only through a full understanding of the nature of this contradiction and from a clear comprehension of the Puerto Rican reality that we can draw some conclusions regarding the principle of self-determination as exemplified in the case of Puerto Rico.

The Puerto Rican reality: Puerto Rico has been a possession of the United States since July 25, 1898, when it became part of the American empire as a prize of war obtained from Spain at the end of the Spanish-American War. Ever since that date, the United States has exercised economic, political, military, and juridical control over the occupied territory of Puerto Rico.

The metropolitan power has, for example, exclusive jurisdiction over such matters as citizenship, foreign relations, defense, immigration and emigration, foreign commerce, currency, maritime and air transportation, postal service, radio, and television. Furthermore, the United States exercises total or partial control over wages, labor-management relations, housing, environmental contamination and pollution, internal transportation, public health, quality standards for foods and pharmaceutical

products, bankruptcy, eminent domain over land and other properties, banking and loan organizations. Moreover, the decisions of the Supreme Court of Puerto Rico can be revised by U.S. federal courts by virtue of the primacy of the Federal Constitution over the Constitution of the Commonwealth of Puerto Rico.

The Congress of the United States has exercised control over these areas from 1898 to 1952 under the Federal Organic Acts of 1901 and 1917, and since 1952 by virtue of Public Law 600 and the Federal Relations Act, both enacted by the U.S. Congress. The so-called Constitution of the Commonwealth of Puerto Rico of 1952 is merely a municipal charter which permits Puerto Rico to exercise a limited degree of local autonomy no larger for all practical purposes than that exercised by the Puerto Rican Government before 1952.

The United Nations and Puerto Rico: As has already been mentioned, in 1953 through Resolution 748(VIII) the United Nations exempted the United States from its obligation of submitting information on the territory of Puerto Rico. Through this resolution, the General Assembly expressed the view that Puerto Rico had exercised self-determination and acquired self-government.

The criteria then utilized by the United Nations in making these determinations are contained in Resolution 742(VIII); similar criteria are contained in Resolution 1541(XV), approved on December 15, 1960. But it is important to note that neither in the debates in the Fourth Commission at that time, nor in the plenary sessions of the General Assembly, was there any analysis of how the criteria for self-government were or were not applicable to the case of Puerto Rico. The delegates' expositions were limited to affirming that the situation of Puerto Rico, upon approval of the 1952 Constitution, was equivalent to a measure of self-government sufficient to permit the discontinuance of the transmittal of information under Article 73(e) of the UN Charter. Moreover, a careful analysis of the criteria contained in the pertinent UN resolutions shows, beyond a shadow of a doubt, that Resolution 748(VIII) was in error. The status of "Commonwealth" did not then, nor does it at present, comply with the requisites for self-government set down by the General Assembly itself.

According to the United Nations a nonautonomous territory is considered to have achieved full self-government, for the purposes of Article 73(e), when it becomes an independent and sovereign state; when it enters into a free association with an independent state; or when it becomes an integral part of an independent state. Clearly, Puerto Rico has not become an independent nation and clearly, it is not a state of the North American Union. Consequently, the United Nations must have assumed for its 1953 decision that Puerto Rico had entered into an association with the United States compatible with Resolution 742(VIII) which lists the factors or applicable criteria. Among these factors, the most important are: (a) those referring to voluntary limitation of sovereignty and the power of the territory to modify its status; (b) those referring to the international personality of the territory; and (c)

those referring to the existence of different alternatives of self-government. Let us examine the applicability of these factors to the case of Puerto Rico.

Puerto Rico lacks the juridical power to modify the basic statutes which regulate its relations with the metropolitan power. This is true not only in theory, but in practice, for in the last 20 years the U.S. Congress has repeatedly refused to effectuate changes proposed by the Commonwealth Government. Neither can Puerto Rico freely make important amendments to its own limited internal Constitution as required by United Nations law since most important aspects of internal affairs, as has already been mentioned, fall within the control of the U.S. Government. Such modifications are always subject to the will of Congress which by disposition of the territorial clause in the U.S. Constitution has the power to regulate the territories belonging to that country. In fact, the measure of internal autonomy which Puerto Rico had in 1953 has actually decreased, for the U.S. Federal Government has further preempted such areas as wages, labor relations, health measures, oil imports, pollution, transportation, and the like. The limited jurisdiction that Puerto Rico at one time exercised over these areas has been decreasing.

With regard to the factors relating to international political status, it is evident that Puerto Rico does not fulfill the necessary requirements. Puerto Rico cannot enter into direct relations of any kind with other governments nor with international institutions. Neither can it freely negotiate, sign, or ratify international instruments. Puerto Rico clearly lacks the power to request admission to the United Nations, a prerogative that belongs in the American juridical sphere to the Federal Government. Puerto Rico is not a member of the United Nations, nor of any other international organization, simply because it lacks the pertinent legal capacity, another one of the factors which United Nations law requires be taken into consideration when analyzing whether a territory has or has not achieved a full measure of self-government.

As regards the criteria of choosing among different alternatives to self-government, Puerto Rico has never had the opportunity of freely selecting its desired political status. Upon approval of the so-called "Commonwealth" status of 1952, Puerto Ricans were merely given the opportunity, in a yes or no referendum, of choosing between the old Jones Act of 1916, as amended, and the new Jones Act under the name of the Federal Relations Act, together with a new municipal charter, which is called "Constitution" in Puerto Rico. Needless to say, we had an almost identical municipal charter before the approval of the so-called Commonwealth Constitution, the only difference being that it was not called "Constitution." This farcical exercise on self-determination was in reality justified upon the premise of colonialism by consent.

The 1967 plebiscite: It is necessary to analyze the 1967 plebiscite which posed the alternatives of independence, statehood, and commonwealth. It was held with the sole intention of validating a posteriori

the great deception by which the United Nations was induced to approve Resolution 748(VIII) of 1953.

This plebiscite was not valid in light of the objectives and procedures established both in the rules and the practices of the United Nations:

First, the U.S. Congress did not pledge itself beforehand to accept the majority will in the plebiscite. The Federal Relations Act was in full force during the plebiscite; there was not the slightest indication that a vote for independence or statehood by the Puerto Rican people would have been respected by the United States.

Second, there was no definition of the alleged broadening of the Commonwealth status so as to make it consonant with UN requirements of self-determination.

Third, the United Nations did not authorize or supervise the plebiscite; it was supervised by the colonial party in power.

Fourth, actual participation was in reality limited to the defenders of two political formulas, the so-called association (Commonwealth) and integration. The colonial government included the independence formula against the will of the Puerto Rican independence forces who believed no fair plebiscite could be held under existing conditions of colonial domination; the voters had no opportunity to vote against the plebiscite as there was no way to do so on the ballot.

Fifth, the plebiscite was held in a territory occupied by U.S. naval, air, and submarine bases and in which such repressive agencies as the FBI and the CIA were actively functioning.

Sixth, the defenders of the colonial status had at their disposal unlimited economic resources and the control of the mass communication media.

It is clear from the preceding analysis that the so-called Commonwealth status did not in 1953, nor does it in 1973, comply with the requirements for self-government established by the UN General Assembly in Resolutions 742(VIII) and 1541(XV). It is also clear, from the point of view of international law, that Resolution 742(VIII) which determined that Puerto Rico had exercised self-determination is not *res judicata* and is, therefore, subject to reversal by the General Assembly. But fortunately, the law of the United Nations in the decolonization field has moved at such a fast pace during the last twenty years that such reversal of a previous declaration of the Assembly has for all practical purposes been obtained sub silentio through a new legal structure created by the United Nations in 1960.

Independence—the only alternative: In Resolution 1514(XV) the UN General Assembly “solemnly proclaims the necessity of putting a rapid and unconditional end to colonialism *in all its forms and manifestations*, and this is based on the conviction that “all peoples have an *inalienable right to absolute freedom*, to the exercise of their sovereignty and to the integrity of their national territory.” The resolution goes on to say that “*in all those remaining territories which have not yet attained their independence*, measures should immediately be taken to transfer

all powers to the people of those territories, without conditions or reservations, in conformity with their will and freely expressed rights and without distinction as to race, creed, or color, in order that they may enjoy *absolute freedom and independence*." In order to implement this resolution the General Assembly then created the Special Committee on Decolonization.

Resolution 1514(XV) clearly contemplates the achievement of independence as the only form of exercising self-determination and terminating colonialism. It is not incompatible with Resolutions 742(VIII) and 1541(XV), which established "association" and integration, together with independence as relations which justify the cessation of reports under Article 73(e) of the Charter. Both resolutions are in harmony. In the case of association, a country may reach a level of self-government which would justify the cessation of reports. The colonial power would be exempted from that obligation, but it would still be bound and obliged to take measures aimed toward granting independence to the concerned territory. In the case of integration, freely chosen by countries with similar cultural heritage, Resolution 1514(XV) would not apply, since the integrated territory would cease to exist as a separate political entity.

The 1972 resolution: Only by fully comprehending the aforementioned juridical reality can we understand the decision of the Special Committee on Decolonization of August 28, 1972, which reads as follows:

The Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples,

Having considered the question of the list of territories to which the Declaration is applicable,

Recognizing the inalienable right of the people of Puerto Rico to self-determination and independence, in accordance with General Assembly Resolution 1514(XV) of 14 December, 1960,

Instructs its working group to submit to it a report, at a date early in 1973, relating specifically to the procedure to be followed by the Special Committee for the Implementation of General Assembly Resolution 1514(XV) with respect to Puerto Rico.

The 27th General Assembly approved the Committee's work program for 1973, which includes the report required by this resolution, thus recognizing, in effect, the colonial condition of Puerto Rico.

As a consequence of this decision, the United States is not under a strict juridical obligation to submit information under Article 73(e), but it is definitely under the obligation to grant independence to the people of Puerto Rico. It is also under the obligation to refrain from acts which will impede the process of decolonization of Puerto Rico; to the contrary it must take affirmative steps to achieve an immediate transfer of all authority and sovereignty to the people of Puerto Rico.

We must conclude, therefore, that under modern international law self-determination and independence are synonymous. In the case of Puerto Rico, this means that it cannot achieve self-determination until

it attains independence. Self-determination is a continuous exercise of power. It is contradictory to argue that nations can self-determine themselves out of self-determination. This is what colonialists try to sustain.

Self-determination has been delayed in respect to Puerto Rico because of the direct interference of the most powerful empire of all times. But the profound liberation forces that have developed in Puerto Rico, in the United States, and in international spheres during the past decades will, in the outcome, crystallize within the Puerto Rican society and we shall have freedom.

THE TRUST TERRITORY OF THE PACIFIC ISLANDS: SOME PERSPECTIVES

*by Roger Clark**

I shall examine the Trust Territory from four overlapping perspectives: as part of the Pacific; in light of the concept of self-determination; in light of American "security interests"; and a final one I shall call epistemology. This last has to do with what the people want and how we know.

(1.) *The Trust Territory as part of the Pacific:* The colonial powers that have dominated the Pacific (and the inhabitants of the Trust Territory have now lived under four of them—Spain, Germany, Japan, and the United States) showed great ingenuity in the constitutional arrangements they devised for governing scattered, sparsely populated islands that are on the whole economically poor for all except a moderate subsistence existence. There have been colonies and protectorates, a condominium, mandates, and trust territories. The process of decolonization has demonstrated similar ingenuity; the emergence, for example, of the Independent Republic of Western Samoa (pop. 130,000); the Republic of Nauru (6,000); the Kingdom of Tonga (90,000); and the Cook Islands (21,000), a self-governing state in free association with New Zealand; Fiji (500,000), which like its big Commonwealth brothers Australia and New Zealand shares the Queen of Great Britain; Hawaii, a full-fledged state of the union; and Guam, an unincorporated territory, its inhabitants apparently proud of their American citizenship and looking forward to even closer ties. The Trust Territory is not unique in most of its problems. Of the two most likely courses for the Territory, the Cook Islands provides the free association model; Nauru and Western Samoa are models on the independence side. The Gilbert and Ellice Islands to the South, feeling some of the same disintegrating forces as the Trust Territory, are following fairly well-worn British paths to complete self-government and probable independence. Occasional suggestions for a great Pacific federation founder rapidly on insularity and coral reefs

* Rutgers-Camden School of Law.

but the South Pacific Commission is promoting some common interests and a sense of identity.

Most of the islands I have mentioned are undercapitalized and lacking in natural resources. In the short, and perhaps even the long run, if they are to have a 20th century economy, they will need capital and perhaps subsidies from the former governing power or from other international sources. A subsidy of some sort may be necessary even to maintain the functions of government.

(2.) *Self-determination*: The negotiators in the Future Status Commission are at this point eager to keep open the option of independence as one form of self-determination. The provisions of Article 82 of the Charter relating to the notion of a strategic trust were tailor-made to fit the former Japanese mandated territories which had been used in such manner as part of the Japanese war effort. Nevertheless, security interests as interpreted in Washington were not contemplated as eternally paramount by the founding fathers at San Francisco. Even a strategic trust is subject to the "basic objectives" of the system set out in Article 76 of the Charter which include the promotion of "the political, economic, social, and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned." (The draft Trusteeship Agreement as presented by the United States to the United Nations omitted the key words "or independence" but in response to prodding by the Soviet Union they appeared in the final version.) Another basic objective of the system is "to further international peace and security" but it is hardly overriding in a clash with the principle of self-determination. The United Nations is unlikely to take the position that a people's freely expressed wish for independence should give way to a U.S. claim that it is holding on in the interests of peace and security as it sees it.

Independence, in terms of the Charter and the Trust Agreement (to say nothing of the customary norm crystallized by, or at least developed under the aegis of, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples) is clearly an option which is lawfully open to the people or peoples of the area. On reading the UN documentation on the Territory, especially the Reports of the Trusteeship Council and its Visiting Missions, I found interesting the extent to which the option of free association is also regarded as perfectly valid. There was of course a certain skepticism in the General Assembly about the genuineness of the desire of the Cook Islanders to remain associated with New Zealand and even more in the case of the British Associated States in the Caribbean. But the documents make no serious criticism of the possibility of free association for the Trust Territory, so long as it really is free. Statements to this effect are underscored in the Trusteeship Council by regular references to the often ignored General Assembly Resolution 1541(XV) of December 15, 1960 with its list of moderate principles which should guide members in determining whether or not

an obligation exists to transmit information under Article 73(e) of the Charter. No doubt this has occurred in part because of the composition of the Trusteeship Council where the moderating hands of Britain, Australia, and France have penned most of the Reports, in contrast to the General Assembly and its Committee of 24. (The Visiting Mission which has recently returned from the Territory is in fact the first to contain a Soviet representative.) Whether the same plain sailing would occur should the issue of terminating the Trusteeship on terms short of independence come before the Security Council is another matter.

A discussion of self-determination must inevitably raise the question of which "self." Does the Territory constitute one people by definition, or do we bow to the reality of nine language groups and a diversity of cultures and take the Territory apart? Should the 1,000 Polynesians in the Southern Carolines be allowed to go it alone? In UN practice it is considered taboo to consider dismembering a dependency or former dependency despite its crazy-quilt colonial boundaries. After all, self-determination is aimed at removing the colonial powers, not at Balkanization. Viewed from this perspective it is easy to see the United States talks with the Marianas (whose population in 1971 constituted 13,000 of the total of 107,000 in the Trust Territory) as just another divide and rule ploy by the colonial masters. The 1970 UN Visiting Mission recorded its view that "like its predecessors, [it] naturally considers that there could be no question of the Mariana Islands being separated from the rest of the Trust Territory while the Trusteeship Agreement is still in force." Even so, the Mission conceded that there was some force to local demands for treating the Marianas separately. The hope expressed in last year's Trusteeship Council Report "that a course of separation would not be considered until all possibilities for partnership had been explored" seems doomed at this point in time.

Another facet of the independence option is what has been called the "mini-state dilemma." The thought of a large influx of tiny states into the UN, each with its one vote, must be a reason to pause but in itself it should not be a reason for denying legitimate aspirations to go it alone. Membership in the international community is not necessarily the same as being entitled to UN membership. Small Pacific states have already solved the size problem creatively. Western Samoa did not apply for UN membership but entered into a Treaty of Friendship with New Zealand after independence under which New Zealand's diplomatic advice and services are available to the Republic. Nauru has obtained a type of associate membership in the British Commonwealth. Fiji has carefully limited its diplomatic outposts. Independence, even in the post-colonial era, is a relative concept and dignified arrangements can be worked out with common sense and good will.

The same comments seem applicable to the question of the Territory's lack of economic viability. The time is long past when independence can be denied on this ground. Indeed one can perhaps see developing (under the umbrella of the human rights principles contained in the Charter) a norm that small ex-dependencies are *entitled* to continued

assistance from the former metropolitan power or from the international community.

(3.) *American security interests:* It is hard to escape the feeling that one option the United States does not contemplate with equanimity is that of complete independence without guarantees for American military installations. Fears of Japanese military resurgence underlay the inauguration of the trust. Doubts about the adequacy of Guam as a last bastion against other potential attackers and the need for some place not too close to home to test fancy hardware underlie the wish to stay. In the course of the fifth round of status talks last April, Ambassador Williams restated the American position that defense authority was required in three categories:

- (a) The responsibility for the defense of Micronesia.
- (b) The ability to prevent third parties from using Micronesia for military-related purposes; and
- (c) The right to use U.S. military bases which might be established in Micronesia to support U.S. security responsibilities in the Pacific Ocean area.

In his review of what that means in detail, the Ambassador said that the United States did not need any land for military use in the districts of Yap, Ponape, or Truk. There was a continuing need for missile research facilities in the Marshalls and, in the near future, a need for military-use land in the Marianas, particularly in Tinian. In Palau the United States seeks only options to lease land and "arrangements that assure future maneuver rights."

There have been few public statements of outright opposition to the American military presence. But in November last and again in December the traditional elected leaders in Palau unanimously made just such a statement. The preambular paragraphs contain the thought that the presence of U.S. installations would make them a prime target in the event of conflict. They prefer the target to be somewhere else. This interesting thought has engendered some similar public sentiment in Australia and New Zealand, the Territory's more sophisticated neighbors to the south.

I have already expressed my opinion that the Charter and the Trust Agreement do not give the American military rights in perpetuity over the area. The time is at hand when the inhabitants are entitled to a free choice on whether they want the presence to continue.

(4.) *Epistemology:* At some stage, as in other Trust Territories, there will probably be a UN-supervised plebiscite. How will we know if the people of the Territory have expressed their views freely and genuinely? Chairman Ed. Pangelinan, at the opening of the Marianas Status Talks last December, stated that: "More than any nation with which we have had contact, the United States has brought to our people the values which we cherish and the economic goals which we desire. Continued affiliation with the United States offers the promise of the preservation of these values and the implementation of these goals." I fear that for "economic goals" you must read "canned fish" and the

other goodies of industrialism. Are these Marcusean false needs? Is this statement something of an epitaph for a society whose true values have been destroyed by its putative trustees? It seems to me that, deliberately or by accident, the wants of the people of the Territory have been manipulated in the direction of American capitalist values. If the Micronesians become sufficiently dependent upon the U.S. economy, they may be unable to opt out. This could well be what has been happening in the Marianas. But the situation in the rest of the territory is more complex. The setting up of the Congress of Micronesia has apparently added another force pulling in the opposite direction, as its members and their electors take their powers seriously. Self-determination amounting to independence—the grasp backwards to hold tight to what remains of old values, or even an attempt to have it all ways—may yet carry the day.

THE APPLICABILITY OF THE PRINCIPLE OF SELF-DETERMINATION TO THE TRUST TERRITORY OF THE PACIFIC ISLANDS

*by James M. Wilson, Jr.**

There can be no doubt that the principle of self-determination is applicable to the Trust Territory of the Pacific Islands.¹ The UN Charter applies it. The United States as administering authority under its 1947 trusteeship agreement with the Security Council has explicitly and repeatedly recognized its applicability. The real question is precisely what elements of the principle are applicable, how they are to be applied, and within what framework.

Given the history of debates in this learned society on the topic of "Self-Determination," it would be clearly presumptuous on my part to enter into an academic argument about how that term is to be defined. I doubt, however, if we need to go quite as far as Professor Emerson in pointing out that "self-determination has from time to time been referred to as the right of a winner in a Darwinian conflict for survival."²

Matters have by no means reached that state in Micronesia. For the sake of brevity let me confine myself to the easy definition of Harold Johnson, who says simply that "self-determination is the process by which a people determine their own sovereign status."³ That is really what our current discussion with the Micronesians regarding their future

* U.S. Deputy Representative for Micronesian Status Negotiations.

¹ Throughout this presentation the terms "Trust Territory of the Pacific Islands" and "Micronesia" will be used interchangeably, although it is recognized that the latter term is sometimes considered broader in scope and lacks the precision of the former.

² R. Emerson, *Self-Determination* 65 AJIL 474 (1971).

³ H. S. Johnson, *SELF-DETERMINATION WITHIN THE COMMUNITY OF NATIONS* 200 (1967).

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political status is all about.⁴ Indeed the situation in Micronesia is not nearly as complex in many respects as in other areas where the principle has been tested. The issues in Micronesia are reasonably straightforward, although a few of the answers may still be somewhat obscure.

Obligations of the U.S. Government as Administering Authority: The obligations are clearly set forth in the 1947 Trusteeship Agreement, which is explicitly made subject to the provisions of the UN Charter regarding self-determination.⁵ Of special relevance to today's discussion is that section of the Trusteeship Agreement which obligates the United States as administering authority to "promote the development of the inhabitants of the Trust Territory toward self-government or independence, as may be appropriate to the particular circumstances of the Trust Territory and its peoples and the freely expressed wishes of the peoples concerned."⁶ This language parallels exactly the language of Article 76 of the Charter.

Also relevant are several resolutions of the General Assembly which though declaratory in nature represent at least a consensus so far as principles are concerned, in particular Resolution 1514(XV) on the granting of independence to colonial countries and peoples, which declares that all people have the right to self-determination and Resolution 1541(XV) regarding the principles to be applied in determining whether or not a non-self-governing territory has reached its full measure of self-government. (Although abstaining in the vote on these resolutions, the United States nevertheless agreed that their essential elements were applicable to the Trust Territory.⁷) Also relevant are the provisions on equal rights and self-determination in the 1970 UN Declaration of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations.⁸

Negotiations to end the Trusteeship: Since 1969 representatives of the U.S. Government and Micronesia have been engaged in negotiations to determine the future political status of the islands and terminate the trusteeship. The Congress of Micronesia in 1969, after examining various alternatives, expressed a clear preference for "a self-governing Micronesian state in free association with the United States."⁹ Last fall they also asked for negotiations on "the establishment of Micronesia

⁴ Nor is it profitable for present purposes to engage in a long exposition of the differences between the "right" and the "principle" of self-determination. Emerson, Higgins, Cross, and others have worked this over well, with essentially inconclusive results. We are dealing wisely here with only the lesser of these and it is unnecessary to decide now whether there is also a legal "right." (See Emerson, *supra* note 2, at 460-61).

⁵ Article 76 specifically makes reference to the Purposes of the United Nations, including *inter alia* the "principle of equal rights and self-determination of peoples," in establishing the objectives of the Trusteeship System.

⁶ TIAS 1665, 61 Stat. 3302-03. (1947).

⁷ See statement of U.S. Representative to the Trusteeship Council, June 13, 1961. UN Doc. T/PV 1147, at 7.

⁸ See General Assembly Res. 2625(XXV), Oct. 24, 1970.

⁹ Report—The Future Political Status Commission, 17, Congress of Micronesia, 3d. Cong., 2d. Sess., Saipan, TTPI, July 1969.

as an independent nation, while continuing negotiations toward Free Association."¹⁰

Following the rejection by the Micronesian Congress of earlier U.S. offers of unincorporated territorial status and a modified commonwealth status, agreement was finally reached last year on the idea of a "Compact of Free Association" under which Micronesia would have its own constitution and full responsibility for its own internal affairs. The United States would be responsible for external affairs and defense, and for the latter purpose limited amounts of land would be made available for U.S. military facilities for an agreed term of years.¹¹

Still to be negotiated are specifics regarding financial arrangements, nationality, transition, and termination. As for the latter, it has been agreed in principle that for a period of years the association would be terminable only by mutual consent but could be terminated thereafter unilaterally. When completed the compact is to be given to the Micronesian and American Congresses for approval and thereafter put to the people of Micronesia in a plebiscite representing a sovereign act of self-determination.

As early as 1950 the Marianas had publicly shown their dissatisfaction with the "accident of history" which had lumped the rest of the Marianas with the Carolines and Marshalls after the U.S. acquisition of Guam at the end of the Spanish-American War. The people of the Northern Marianas by history, tradition, language, and ethnic and family ties had been linked with Guam from time immemorial and not with the rest of Micronesia. Their desire for a closer relationship had been expressed in a long series of votes and petitions to the United States and the United Nations. The Marianas, nevertheless, had gone along with the other districts of Micronesia during the early stages of negotiations with the U.S. Government. However, in late 1971 when it became clear that the rest of the Micronesian delegation wanted a looser association than previously contemplated, the Marianas asked for separate negotiation of a much closer relationship between themselves and the United States. The United States finally agreed in the spring of 1972 and separate talks were initiated in Saipan last December.

The Congress of Micronesia in its 1969 Report on Future Status had recognized this desire of the Marianas for closer association and had stated it had no objection so long as this would not result in intolerable harm to minorities in the Marianas or to Micronesia as a whole. Micronesian negotiators also interposed no objection when representatives of the Marianas on their delegation formally broke step. However, at the end of February of this year, a badly divided Micronesian Congress passed a "sense of the Congress" resolution declaring that it considered its negotiating committee to be the *sole* body authorized to negotiate

¹⁰ Future Political Status of the TTPI Micronesia, at 13, Proc. of the Sixth Round of Negotiations, Barbers Point, Hawaii, Sept 28-Oct 6, 1972.

¹¹ Text of incomplete tentative draft Compact is appended to Final Joint Communique issued in Wash., D. C. Aug. 1972. Proc. of Fifth Round, Micronesian Status Negotiations, Wash., D. C., July 12-August 11, 1972, at 20-35.

with the United States on behalf of *all* parts of the Trust Territory. The United States for its part was already on record in the UN Trusteeship Council to the effect that, while the Trusteeship Agreement can be terminated only for all districts at once, there is no legal obstacle to a negotiation with one part of the Trust Territory which would lead to its separate status after the Trusteeship ends.¹²

Self-Determination issues: At least two issues have been raised thus far regarding the application of the principle of self-determination to these Micronesian status negotiations. The first is by now almost a classic argument: can the result of the exercise of self-determination be anything less than full independence; that is, will the principle of self-determination be fulfilled if the people of Micronesia of their own free will choose a status of free association with the United States rather than full independence?

The U.S. Government has been consistent in its position on this score since the earliest days of debate on the UN Charter. Then the United States set forth an objective of self-government, which by definition could include independence for those who aspired to it and were capable of assuming the responsibilities involved but did not make independence mandatory. As Ralph Bunche explained it, "The issue as it affected the trusteeship system was finally resolved by providing alternative goals of self-government or independence in accordance with the particular circumstances of each territory and its peoples and their freely expressed wishes."¹³ Moreover, the obligation of the administering authority under the Trusteeship Agreement is also expressed in the alternative: self-government *or* independence—meaning, of course, "self-government and independence or self-government alone."¹⁴

The U.S. position is also perfectly compatible with the declaratory resolutions of the General Assembly. While Resolution 1514 speaks of the granting of independence to non-self-governing peoples, it points out that the exercise of self-determination involves a free determination of their political status; and this is what the U.S. and Micronesian delegations have agreed to do. In addition both Resolution 1541, adopted almost contemporaneously, and the 1970 Declaration on equal rights and self-determination recognize that a legitimate outcome of the exercise of self-determination may be not only independence but also association or integration with an independent state. Ample precedent exists for an arrangement of free association between dependent areas and independent states, possibly the closest example being the case of the Cook Islands whose desire for continued ties with New Zealand was accepted even by the Committee of 24.

The second issue concerns the right of the Marianas District to pursue separate negotiations with the United States. The argument here is also familiar. Self-determination is held by some to apply only in exter-

¹² UN Doc. T/PV 1389 at 11 (1972).

¹³ See R. Bunche, *Trusteeship and Non-Self-Governing Territories in the Charter of the United Nations*, 13 DEPT. STATE BULL. 1037, 1038-1040. (1945).

¹⁴ See E. Toussaint, *THE TRUSTEESHIP SYSTEM OF THE UNITED NATIONS*, 58 ff. (1956).

nal relations, when it is directed against a foreign power, and not internally, when it might apply to minorities within the dependent unit. The question here is the unit to which the principle of self-determination is to be applied.

Before 1947 the several districts of the Trust Territory were never united politically except under very loose colonial administration. The Northern Marianas was separately administered for years even under the Trusteeship. Also, as one of the current leaders of Micronesia has said, "Today there is no Micronesia—if there is to be one tomorrow we will have to create it."¹⁵

Since the start of the Trusteeship, U.S. policy has been to promote the unity of the Territory and avoid further fragmentation if at all possible. In finally agreeing to separate negotiations with the Marianas, however, the U.S. Government was strongly influenced by the unique history of the Marianas and their repeatedly expressed desire for a separate, close relationship. As stated by the U.S. Representative to the UN Trusteeship Council: "Had the United States responded other than positively to the Marianas initiative, that could have lead ultimately to an imposition upon the people of the district of a political status they had made abundantly clear they did not want."¹⁶ Or as was observed in the formal U.S. response to the Marianas request, a negative reply "would deny them their right of self-determination."¹⁷ There is precedent again for separation in UN practice, found in the case of the termination of the British Trusteeship in the Cameroons. The contrary argument, however, goes back to the early discussions of the Charter itself where it was stated that the principle of self-determination "conformed to the purposes of the Charter only insofar as it implied the right of self-government of peoples and not the right of secession."¹⁸ On the other hand, as I explained to the latest U.N. Trusteeship Council Visiting Mission before it visited the territory in February of this year, the Marianas did not regard this as a case of secession but rather a request for a divorce after a shot-gun marriage.

Possibly these issues will never be solved to the full satisfaction of all the scholars and all the countries of the world. The important thing in the Micronesian situation today, however, seems to be not the legal argument but a very pragmatic political consideration—how to assure the realization of the freely expressed will of the peoples concerned. In this regard there is much to be said for the views advanced in this forum five years ago by Professor Fisher when he made his plea for flexibility in the application of the principle of self-determination to micro-states and said, "Self-determination is not a single choice to be

¹⁵ Quoted by Amb. F. Haydn Williams in *Hearings before the Sub-Comm. on Territories and Insular Affairs, House Comm. on Interior and Insular Affairs*, March 15, 1973 (not yet published).

¹⁶ UN Doc. T/PV 1389, at 11 (1972).

¹⁷ "The Future Political Status of the TTPI," at 68, Off. Rec. of the Fourth Round of Micronesia Future Political Status Talks, April 2-13, 1972.

¹⁸ 6 UNCIO 295 (1945).

made in a single day. It is the right of a group to adopt their political position to a complicated world to reflect changing capabilities and changing opportunities."¹⁹

The CHAIRMAN, inviting discussion, said that several legal questions had emerged. First, could the exercise of self-determination for a territory be completed at a stage short of full independence? It was clear that independence could be achieved by merger with another state; for example, British Togoland had become part of Ghana and the British Cameroons was another example. It was also clear that independence did not require membership in the United Nations; Nauru, Tonga, and Western Samoa had not applied for membership. But could self-determination be completed with some form of political status other than full independence, for example, some constitutional association with another country? Senator Berrios had argued that self-determination, as provided for in the UN Charter, was not finished until there was full independence. Other speakers had taken a different view.

Secondly, could self-determination result in the division of a territory or did the territory have to remain intact? SIR JAMES was of the view that this point had been decided by the United Nations having agreed to the division of the British Cameroons, when as a result of plebiscites the southern half of that Trust Territory had become part of Cameroon and the northern half had become part of Nigeria. But some related questions deserved consideration. What processes should be followed in deciding whether a territory should be divided? Did the people of the whole territory have to consent to the territory being divided, or would it be sufficient that those in a distinctive area of the territory held a strong view for a separate entity?

Thirdly, was the act of self-determination a once and for all, irrevocable act? Could the people of a territory have second thoughts? Could they, having agreed to one political status, subsequently in the name of self-determination seek something different? It might be said that, if the right of self-determination had been exercised, any subsequent change was a matter of domestic policy to be decided by the play of political forces in the territory. But there was a related question. Could the international community, as represented by the United Nations, divest itself permanently of the right to concern itself with the status of a territory so long as that territory had not achieved full independence? Could the people of a territory, not fully independent, remove from the United Nations that right? Senator Berrios would argue that the United Nations retained such a right until full independence had been achieved. Some other speakers would take a different view.

The CHAIRMAN concluded with a final question, namely, how were the present status of, and the current developments in relation to, Puerto Rico and the Trust Territory of the Pacific Islands related to the foregoing questions? He then opened the session for comments and questions.

¹⁹ R. Fisher, *The Participation of Micro-States in International Affairs*, [1968] PROC. AMER. SOC. OF INT. LAW, 166.

With reference to the role of the United Nations in the process of self-determination, Senator Berrios was asked whether he thought the United Nations could impose self-determination on Gibraltar, and whether the act of self-determination is consummated with the attainment of independence. If so, are there any options open to parts of the new state to express their self-determination? Senator BERRIOS replied that self-determination constitutes a continuing exercise of power, independence being the first necessary step in the process. An act of liberty cannot be exercised in slavery; therefore self-determination cannot take place under colonial conditions. As regards free association, a nation must first be free, *i.e.*, independent, before entering into an association with another nation.

The question was raised whether in the event of Puerto Rican independence the emerging structures might not reflect the preindependence situation as a result of the lasting effects of American imperialist manipulation of Puerto Rican public opinion. Senator BERRIOS wholeheartedly agreed with this possibility. As he pointed out during his presentation, the United States exercises extensive controls over important sectors of Puerto Rican life, among them the political and economic spheres and the mass media. The Senator added that the question of Puerto Rican self-determination cannot be dealt with solely in terms of juridicial issues; socio-economic considerations must also be taken into account.

Asked whether the termination of the Pacific Islands trusteeship and the conditions thereof would be guaranteed by the United Nations, Mr. WILSON responded affirmatively, indicating that, this being a strategic trusteeship, appropriate termination conditions would be guaranteed ultimately by the Security Council.

At this point the Chairman introduced Mr. ANTONIO B. WON PAT, Delegate of Guam to the U.S. Congress, who had previously requested an opportunity to address the meeting. Mr. WON PAT referred to Guam's own struggle for self-determination and the accomplishments of the people of Guam in this endeavor under the enlightened guidance of the United States. He noted the importance of economic factors in the self-determination process, stressing the fact that without adequate economic provisions self-determination is meaningless.

With respect to Commissioner Benitez's point that today there are no really independent states, including great powers like the United States, the panelists were asked whether they would subscribe to the Orwellian paraphrase that some nations are more independent than others. All countries are dependent, or better, interdependent, some more so than others, Mr. BENITEZ responded. He added that, if self-determination has to culminate in independence as the only possible outcome, it would not be self-determination but compulsion and imposition in the name of theory, a theory that reality has invalidated. With respect to the relationship between reality and law, Commissioner BENITEZ noted that Senator Berrios had taken flight from reality with the consequent misconception of Puerto Rico as a nation in bondage

under the constraints of American military occupation. This view, he added, is shared by some members of the United Nations, among them Cuba, the USSR, China, Bulgaria, and Tanzania, which try to impose independence on Puerto Rico in contradiction of the express desires of the Puerto Rican people. These countries and the Puerto Rican independence forces resort to "juridical hocus pocus" to transpose actual Puerto Rican reality into theoretical bondage. In response to Mr. Benitez's remarks, Senator BERRIOS affirmed that the Puerto Ricans will free themselves notwithstanding the so-called "juridical hocus pocus."

Mr. CABRANES pointed out that the quality of debate on the issues of decolonization and self-determination invariably suffers as a result of the debasement of language and rhetoric. Colonialism and imperialism, for example, are now commonly employed as terms of abuse. Couched in Marxist vocabulary they connote to the leftist mind "the wickedness and decay of capitalism."

He expressed his agreement with Professor Julius W. Pratt in the sense that the American experiment with colonialism has been motivated by a variety of considerations, among them strategic, economic, and benevolent. Although he did not wish to appear particularly defensive of U.S. policy in Puerto Rico, Mr. CABRANES felt that the United States would respond favorably to the aspirations of the Puerto Rican people by supporting whatever political status they desire. Puerto Rico has chosen free association as a form of legitimate self-determination recognized by UN General Assembly Resolution 1541(XV) of December, 1960. Contrary to the wishes of Mr. Berrios and his colleagues, it is the people of Puerto Rico themselves and not any other group or institution who will make the ultimate decision regarding their self-determination and political status.

ANGEL CALDERÓN-CRUZ
JOHN TARKONG
Reporters

TOWARDS SALT II: INTERPRETATION AND POLICY IMPLICATIONS OF THE SALT AGREEMENTS

The panel convened at 2:30 p.m., April 12, 1973, Mason Willrich* presiding.

The CHAIRMAN remarked that the topic under discussion was the second session of the strategic arms limitation talks, or SALT II, the implications of these talks, and the available options for the future. Discussion of these issues, he observed, is very important since avoiding nuclear war has become the major preoccupation of our nuclear age. The idea of arms control is becoming legitimized as part of our national security

* University of Virginia School of Law.

policy, but for all the massive verbatim record of arms control negotiations in various forums, only a slender volume of agreements has resulted. The agreements reached in the first SALT round are therefore all the more significant as the keystone of the new Soviet-American relations.

AN OVERVIEW OF SALT I

*by John B. Rhinelanders**

SALT deals with strategic objectives and doctrine, weapons systems, evolving technology, and is discussed in esoteric terminology. Decisions, however, are made by political leaders in the United States and the USSR in political contexts. Of the four agreements concluded at SALT I, the Anti-Ballistic Missile (ABM) Treaty is clearly the most important. Other agreements are the Interim Agreement on Limitation of Strategic Offensive Systems; the Accident Measures Agreement; and the revised Hot Line Agreement.

The key objective at SALT II will be to replace the Interim Agreement. The key issues, in my view, will involve constraints on MIRV's, which the United States has deployed on both sea-based and land-based ballistic missiles and which the Soviets now are not expected to deploy until the mid 1970's, and phased reductions of U.S. and USSR strategic nuclear arsenals. Neither the United States nor the USSR had to face issues of equal complexity or magnitude at SALT I.

Politics of SALT

In the U.S. decisionmaking process, SALT I has been characterized by a knowledgeable observer as involving 60% technology and 40% politics. To illustrate this point, I will mention five political byplays and factors which affect SALT.

First, the most recent Defense Department Posture Statements delivered by Defense Secretary Richardson and Admiral Moorer, setting forth the U.S. defense budget, are the lowest keyed in years. No new Soviet programs are announced. Present Soviet ICBM's are described as not being capable of a first strike threat in that they lack the combination of accuracy, yield, and number of warheads. Soviet ICBM programs are described as designed to increase the survivability of Soviet missiles. Despite the absence of any new Soviet or Chinese threat, there has been no curtailment of defense programs as announced last June after the Moscow Summit Meeting was concluded with one exception; no request is made for funds for a National Command Authority ABM complex for the Washington area. Last summer, the Congress refused to fund such a system even though the United States is permitted to build

* Of the District of Columbia Bar.

one under the terms of the ABM Treaty. Clearly, the Congress will face key policy and budgetary decisions this year, particularly in the request for funds for the Trident submarine. In addition, many of the funds in the budget for R&D appear to continue the "bargaining chip" approach: there are funds for Hardsight Defense in the event the ABM Treaty is abrogated; there are funds for mobile ICBM's since fixed, land-based ICBM's will become vulnerable over time and because the Soviets may have an interest in mobile ICBM's; finally, there are funds for cruise missiles based on the theory that these are not constrained by the Interim Agreement—the Soviets have some, and, therefore, the United States should at least have a cruise missile program. Whether the U.S. defense *posture* will change prior to the conclusion of SALT II is one of the key political questions.

Second, the rise and fall of the Arms Control and Disarmament Agency (ACDA) seems clearly to be a matter of domestic politics. Gerard Smith, the director, and all key assistants have either resigned or been dismissed. The ACDA budget has been cut by more than one-third. The head of the U.S. SALT delegation at SALT II is no longer the director of ACDA, and, in fact, the new head of the SALT delegation was named before the new director of ACDA. ACDA appears to be a sacrificial lamb offered to the domestic critics of SALT I. This is full of irony since the President and Dr. Kissinger set the U.S. position during the Vienna and Helsinki phases of SALT I and negotiated the final outstanding issues at the Moscow Summit while both the U.S. and USSR SALT delegations remained in Finland. It is too early to forecast the role, the influence, and the position of ACDA or the State Department as a counterbalance to the civilian and military side of the Pentagon when decisions are being made for SALT II, or the role of the new ACDA director, Fred Iklé.

Third, the decisionmaking process in the United States, and presumably in the USSR, as it relates to SALT is complex, involving many competing departments, agencies, and groups. In the United States, interagency positions are coordinated through the National Security Council mechanism with final decisions being made in the White House. During SALT I, four separate congressional committees were briefed in executive session on the results of each negotiating session and members of these committees were frequently briefed while the sessions were going on. The annual defense budget review raises questions in a different forum. With respect to the decisionmaking process, three comments seem to be in order, the first two being in the form of questions. Will the United States formulate a comprehensive negotiable position early at SALT II or will hard decisions be deferred? Can or will the Soviets take important initiatives at SALT II, or will important issues be avoided by both sides, as MIRV's were for all practical purposes at SALT I? Based on press reports to date, it would not appear that the United States has made any tough decisions yet for SALT II.

Fourth, consultation with U.S. treaty allies involves political questions of a different nature. During SALT I, there were periodic consultations

with the North Atlantic Council in Brussels and with other allies here in Washington. At least three issues of importance to our European allies which were deferred at SALT I will have to be faced at SALT II: (a) Forward Based Systems (FBS) which include U.S. fighter-bombers stationed in Europe or on U.S. aircraft carriers, an issue raised by the Soviets in defining strategic offensive systems which torpedoed any chance of a comprehensive agreement limiting strategic offensive systems at SALT I; (b) forward bases, which include the U.S. Polaris bases at Rota, Spain and Holy Loch, Scotland, that the United States uses for the forward deployment of ballistic missile submarines, while at the same time vigorously objecting to any Soviet submarine bases in Cuba; and (c) limitations on the transfer of ballistic missile technology to our allies, which would be of particular concern to the United Kingdom.

Fifth, and perhaps most important, is the role of Congress, and particularly Senator Jackson. It is no secret that Senator Jackson was unhappy with the results of SALT I and was not impressed with U.S. negotiating skills. I believe he feels that the two ABM sites permitted by the ABM Treaty are close to worthless, but that he is particularly disturbed by the Soviet numerical advantage in both ICBM's and SLBM's permitted by the Interim Agreement. During the congressional debate on the SALT I agreements last summer, Senator Jackson introduced an amendment to the joint resolution approving the Interim Agreement which "urges and requests the President to seek a future treaty that, inter alia, would not limit the U.S. to levels of intercontinental strategic forces inferior to the limits provided for the Soviet Union." The Jackson amendment is nonbinding as a legal matter, and Jackson and the Administration do not agree as to the meaning of the resolution. Four questions seem important to me: (a) Will the Administration tailor the U.S. position at SALT II to meet Senator Jackson's concerns? (b) Will the Administration break with Senator Jackson during the negotiations at SALT II? (c) Could Senator Jackson block a SALT II treaty if he were not satisfied with the results? (d) Will the Administration believe Senator Jackson could and would block a SALT II treaty, and shape its policies accordingly? To further set these questions in terms of their political context, it is my feeling that a comprehensive SALT II agreement limiting strategic offensive systems is unlikely to be reached prior to the heating up of the presidential politicking in late 1975 or early 1976.

Initial SALT Agreements

The ABM Treaty: The ABM Treaty is by far and away the most significant of the four agreements concluded at SALT I. It could well serve to break what has been called the action-reaction cycle in the world of strategic arms by reducing the incentive to increase offensive arsenals. Both the United States and the USSR in effect have agreed to remain defenseless against the strategic weapons deployed by the other; those strategic offensive weapons surviving a first strike by the other side are assured of getting through to their targets by the absence of an effective

defense. The ABM Treaty codifies mutual deterrence, a doctrine based on present technological fact. No ABM technology is in sight which could change the present strategic equation where strategic offensive systems dominate strategic defensive systems. These are the present principal thrusts of the ABM Treaty, but its terms include a variety of specific provisions which are of significant importance in moving toward control of nuclear weapons.

The ABM Treaty bans the nationwide deployment of ABM systems or the base for such a system. It authorizes two widely separated ABM complexes in the United States and the USSR, each limited to 100 ABM launchers and missiles and various constraints on ABM radars. One of the two authorized ABM complexes is for the defense of national capitals, permitting a system the Soviets had partially deployed around Moscow. The second authorized ABM complex is for defense of the deterrent (*i.e.*, defense of ICBM silo launchers) such as the present U.S. system being deployed at Grand Forks, North Dakota. Both advocates and critics of the ABM Treaty agree that neither the present U.S. nor USSR complexes are militarily effective with respect to the strategic offensive systems available to both sides.

The treaty limits testing of ABM components (ABM launchers, missiles, and radars) to the present ABM test ranges. The number of ABM launchers at test ranges is limited to fifteen. There are no limits on the number of tests which can be conducted from these ranges.

The treaty prohibits the development, testing, or deployment of ABM components that are sea-based, air-based, space-based, or mobile land-based. These are important qualitative constraints which limit authorized ABM systems and components to those which are fixed, land-based. In addition, the treaty prohibits the deployment (but not the development or testing) of "future" ABM systems based on components capable of substituting for ABM missiles, launchers, or radars. By way of example, this would prohibit the use of lasers as a substitute for ABM missiles. The treaty also prohibits the development, testing, or deployment of automatic, semi-automatic or rapid reload ABM launchers and ABM missiles with MIRV warheads, important corollaries to the basic ban on nationwide ABM systems. While the treaty does not directly limit the anti-aircraft systems, it does prohibit the testing of non-ABM's (such as surface-to-air missiles (SAM's) designed to shoot down aircraft) in an ABM mode. This latter constraint is generally referred to as the "SAM upgrade" problem, and is another important qualitative constraint. While early warning radars are not considered ABM components, certain constraints are designed to assure that radars for early warning against strategic missiles are not deployed in a way which would significantly provide an ABM capability.

The treaty's provisions on verification are clearly landmarks in the arms control field. The treaty refers to "national technical means of verification," which would include observation satellites, land-based and sea-based radars, and other information-collection systems. U.S. capabilities in this field are quite clear from the details of Soviet and

Chinese programs made public in the recent Defense Department Posture Statements. The treaty also includes important provisions with respect to noninterference with, and nonconcealment from, national technical means of verification. It also provides for the prompt establishment of a Standing Consultative Commission to promote the objective and facilitate the implementation of the SALT agreements. The charter for this commission was agreed at, and was made public after, the end of the first session of SALT II in December 1972.

The treaty prohibits the transfer of ABM systems and components to third countries and their deployment by the United States or the USSR outside their own territories. While the term of the treaty is for unlimited duration, there is a withdrawal clause based on supreme interests which has become standard in recent international arms control treaties. In addition to this provision in the text, the United States made a statement linking the durability of the ABM Treaty to the success at SALT II with respect to comprehensive constraints on strategic offensive systems.

While this summary of the ABM Treaty does not cover all its provisions, it should indicate that the treaty is not only comprehensive in scope but combines quantitative with qualitative constraints. It requires the United States to dismantle an ABM complex under construction in Montana. It does not, of course, require either the United States or the USSR to build a second authorized ABM complex within the treaty constraints.

Interim Agreement: The Interim Agreement places limited constraints on certain strategic offensive forces. It has sometimes been characterized as a "freeze," while a comprehensive agreement is negotiated at SALT II.

The agreement prohibits the construction of additional, fixed, land-based Intercontinental Ballistic Missiles (ICBM) launchers, thereby limiting the United States to a maximum of 1054 and the USSR to a maximum of 1618. It does not prohibit modernization of present launchers. The United States made clear that the deployment of mobile ICBM launchers would be inconsistent with the provisions of the agreement. The agreement also prohibits the conversion of small ICBM launchers to large ICBM launchers. This effectively limits the USSR to 313 launchers which could handle their giant SS-9 missile.

The agreement limits both ballistic missile submarines and launchers for submarine launched ballistic missiles (SLBM's) to the number operational or under construction, but the replacement of present submarines by newer ones is not prohibited. An attached Protocol notes the United States presently has 41 ballistic missile submarines with 656 SLBM launch tubes. The United States may increase these totals to 44 submarines and 710 launchers if it dismantles the 54 Titan ICBM's which were deployed before 1964. There was no agreement at SALT or the Moscow Summit as to the present number of Soviet ballistic missile submarines or launchers which were "operational or under construction" due in large part to a failure to agree on a definition of "under construction." At present, the Soviets have fewer modern ballistic missile submarines which are operational than the United States. The agree-

ment permits the Soviets ultimately to deploy 62 modern ballistic missile submarines with 950 launchers, but would require them to dismantle approximately 200 existing ICBM launchers if they seek to deploy SLBM's in that number. The substitution formula, permitting sea-based systems to replace land-based systems, is referred to as a one way freedom to mix.

The Interim Agreement does not cover strategic bombers where the United States has a significant numerical and qualitative lead. With one limited exception, it does not contain qualitative constraints. It does not limit the on-going U.S. MIRV program nor any Soviet efforts in this field. It does not limit megatonnage where the USSR has the lead with respect to missiles but not bombers. The Interim Agreement is for a term of five years and will, therefore, lapse on October 3, 1977, unless extended or superseded by an agreement reached at SALT II.

The Accident Measures and revised Hot Line Agreements: Two lesser agreements were concluded at SALT I and signed on September 30, 1971, at a time when progress was still slow on the more important arms control limitations. The Accident Measures Agreement basically sets forth steps the United States and the USSR will take in case events might threaten the outbreak of nuclear war. It provides for immediate notification, using the Hot Line if necessary, if any of these events occur.

The revised Hot Line Agreement provides for the use of satellites and multiple ground terminals in both the United States and the USSR in order to provide more reliable communications between heads of states. These new systems are expected to go into operation in 1974. The Hot Line will continue to provide coded written messages and not voice communication.

An interesting question is whether these two agreements might serve as models for initial agreements between the United States and China. There is no likelihood, in my view, that SALT will include the other three nuclear weapon states in the foreseeable future.

Conclusion

Intragovernmental decisionmaking in the United States, and the negotiations between the United States and the USSR of a mutually acceptable SALT II package will be very difficult, more so than at SALT I. Comprehensive constraints on strategic offensive systems, including qualitative limitations and reductions, would require major decisions in Washington and Moscow and would not be easy to negotiate.

While the subject of this panel is SALT, it is important to note other negotiations in progress which are of great importance, particularly to our European allies: the first, dealing with European security, has been underway in Helsinki; the second, dealing with the mutual and balanced force reductions in Europe, has not yet even gotten off the ground in Vienna.

In conclusion, I do not see any signs that progress has been made

yet at SALT II. Very little public pressure is evident. If progress is not made at SALT II before the Soviets flight-test MIRV's, which was recently projected by Defense Secretary Richardson for the mid 1970's, then a golden chance to limit strategic arms will have been lost.

FUTURE FORCES AND FUTURE POLICIES

*by Richard L. Garwin**

Pertinent Highlights of the SALT Agreements: The SALT I Agreements signed in Moscow May 26, 1972, were the result of more than three years of negotiation by the Nixon Administration. They provide the basis for a great improvement in national security. The ABM Treaty recognizes the technical reality that neither the Soviet Union nor the United States can defend its population or industry against ballistic missile attack and that it is not simply wasteful but counterproductive to try to do so. The treaty limits each side to a negligible defense at two sites—the national capital and another at least 800 miles away. Furthermore, it limits the number of radar complexes around the national capital to six, at most, and the number of interceptors at each of the two sites to 100, with the clear implication that not only should these defenses against missiles be penetrable but also destroyable by those missiles.

The treaty breaks new ground in verification and in assurance that the commitments will in fact be kept. Among such clauses are those forbidding (i) interference with national means of inspection (*e.g.*, photographic satellites), (ii) the use of camouflage of the controlled activities, and (iii) development or deployment of mobile ABM, whether based in space, in the air, on ship, or on mobile land vehicles.

A limited agreement on offensive forces prescribes numerical limits on Soviet ICBM's and submarine-launched ballistic missiles far below the levels with which Secretary Laird used to frighten us for that same period.

Pre-SALT U.S. Strategic Forces and Programs: What were we doing before the SALT I Agreement? The United States had no program in deployment or development to increase either ICBM numbers or payload. The B-1 bomber was in development as was a new submarine-launched ballistic missile—the ULM (undersea-launched ballistic missile, now called Trident). Retrofit programs were in process to replace the single warheads on 550 of the 1000 Minuteman missiles each by three MIRV's. In progress also was a refitting program to replace 31 Polaris submarine-loads of 16 missiles each by a corresponding number of Poseidon missiles with 10 or more warheads. Thus the land-based missile force would increase in numbers of individually targeted

* International Business Machines Corporation.

warheads from 1054 to 2154, and the submarine-based force from 656 to more than 4600. At the same time we were maintaining more than 450 B-52 strategic bombers, with a total normal fleet payload of nuclear weapons far in excess of that available on Soviet missiles and bombers together.

Missions of the Strategic Force: In order to decide questions of future force structure and response to various numbers and types of Soviet forces, we have to ask what purpose these weapons serve. There are at least two:

(1) Against the Soviet Union, our total force has served the purpose of *deterrence*, and its size and nature has been chosen so that there could be no doubt regarding its adequacy for this purpose not only at any given time but against any defenses or preemptive destruction which the Soviet Union might launch in the years before the strategic offensive force could be modified to respond. This is an exceedingly durable, necessary, but somewhat limited function. The existence of this force in its deterrent role is clear evidence to the Soviet Union that an annihilating strike against the United States would lead as certainly to the annihilation of the Soviet Union as if the Soviet nuclear weapons were used against their own homeland. This is a useful function for the U.S. strategic offensive forces, and it is the only one which has been publicly used to justify any given number of ICBM's, SLBM's, and bombers. These numbers have been justified not on the basis of current need, but as a hedge against the greater-than-expected future development and deployment of Soviet ABM and large missiles (at a time when no Soviet program was constrained by any treaty).

(2) Against all other countries, our strategic offensive force has in fact provided a controllable, flexible, rapid, and sure means to destroy by means of nuclear weapons isolated military bases or other establishments, dams, cities, field army headquarters, etc. It is not a lack in the weapons technology or in the nature of the weapons, but a lack of conviction as to their utility and as to our infallibility which has barred the use of any nuclear weapons and especially of the strategic-offensive nuclear weapons in Korea, Berlin, or Vietnam. It is important to recognize that the treaty banning an effective Soviet ABM now guarantees for the future (as is the case now) the penetration to the target of any U.S. warhead launched against a Soviet military target outside the Moscow area.

Not since the end of the U.S. monopoly on nuclear weapons in the early fifties has the U.S. possession of nuclear weapons eliminated the necessity to consider and to prepare for the fighting of non-nuclear conflict. Particularly against the Soviet Union, this condition still obtains. As with strategic forces, the numbers of non-nuclear forces are set by the possibility of conflict with the Soviet Union and its allies, but with one exception—the conventional forces have to fight Soviet conventional forces, while the strategic forces in the past have had to reckon only with nature in their trajectory to their deterrent targets. Indeed, while our conventional forces have serious deficiencies and many uncertainties,

and while means have been demonstrated for greatly increasing their effectiveness, emphasis has been placed to an astonishing extent in recent public debate on the necessity to modernize and otherwise improve the strategic forces! This at a time when the SALT Agreements have greatly limited the magnitude of possible future threats to the effectiveness of the deterrent.

In fact, just before the SALT Agreements were signed, Secretary Laird requested an acceleration of the Trident program, and this request was in no way rescinded by the achievement of SALT—quite the contrary! So we find ourselves with land-based missiles and submarine-based missiles in very large numbers, with a MIRV program increasing the number of ICBM and SLBM warheads by a factor of two and seven, respectively, although last year we signed a treaty with the Soviet Union which guarantees that each of these warheads will have a free ride to its target. Remember, one of the main incentives for these MIRV programs was to penetrate some future Soviet ABM, and the Administration apparently felt that these programs were quite adequate even when the Soviet Union was unconstrained as to the size and nature of the ABM which it might develop and deploy.

Future Strategic Weapons Programs: Worse for our national security is the headlong rush of the Defense Department to commit the United States not only to development but deployment of the Trident submarine and missile. It has all but concealed the fact that the program subsumes the Trident I missile (with a range of more than 4000 miles and which can replace the Poseidon missiles in some of the Poseidon launchers) as well as a completely new and rather amorphously specified submarine which will carry either the Trident I missile or the larger Trident II missile with a range of some 6000 miles. The primary reason given for work on Trident is the possibility of Soviet advances in antisubmarine warfare (ASW) and the Trident I missile for retrofit into some of the Poseidon launchers would be both a useful hedge and have some other utility in its own right. But the Trident submarine, now that the base has been chosen in Washington State, must travel across the Pacific Ocean in order to target Moscow with its Trident I missiles, an ocean to which the Soviet Union has free access for the emplacement of many kinds of ASW devices.

The implications of SALT I for strategic weapons procurement is that we can afford to do less rather than more. To the extent that there is concern about the preservation of all three branches of the deterrent for the indefinite future, the bomber force can be made much more effective with SCAD, a bomber-launched cruise missile which can attack Soviet targets when launched from aircraft outside the Soviet Union. SCAD is now under development and can be available in large numbers years before a new B-1 aircraft could come into the force. Similarly, the Trident I missile should be expedited and the Trident submarine and the Trident II missile should be held back until one can be sure that the submarine program improves rather than impairs national security. As for preservation of the Minuteman from destruction before

launch, the evolution of that threat would require not only very major strides and investments by the Soviet Union in accuracy improvement and MIRV technology, it would also require absolute confidence on their part not only that the Minuteman could be destroyed in this way, but that they could destroy or counter at the same instant almost 100% of the U.S. bomber and submarine-launched missile force. There is no technical reason why the Soviet Union could not eventually deploy enough MIRV's of sufficient accuracy to destroy Minuteman *silos*, but it strains one's credulity to be asked to believe that the Soviet Union not only would have absolute confidence in their ability to destroy Minuteman silos and U.S. SLBM's, and to counter the bombers and their missiles, but also that they should be confident *under those circumstances* that the United States would not in fact be willing and even anxious to be prepared to launch the Minutemen before they were destroyed.

The Myth of "Inflexibility": There is more "flexibility" in the existing forces than most people are willing to credit. The President has, right now, the technical capability in the forces in-being to have far more than "the single option of ordering the mass destruction of enemy civilians, in the face of the certainty that it would be followed by the mass slaughter of Americans." If the need is to write down these additional options on a piece of paper, the purchase of B-1's or Trident submarines is not going to help one bit. Many of the critics of SALT seem to equate flexibility with the development of a "hard-target" warhead for Minuteman, which would add primarily the *appearance* of the possibility of our being able to strike preemptively and to destroy the Soviet ICBM force, which constitutes a far larger proportion of their strategic forces than does ours. In reality, we would be able to threaten only their *silos*; such a program could lead to the abandonment of SALT I, but it would not lead to our acquisition of a real capability to destroy Soviet missiles in the ground in any strategically meaningful way.

The Myth of the Arms Race: With ABM banned under the SALT I Treaty, the arms race has become strictly optional, and this is evident from the new arguments pressed into service by some of our military and political figures:

—Even if not militarily significant, more or new weapons may have political significance in the eyes of our allies.

—New weapons are needed as bargaining chips to ensure further progress in SALT.

—A \$13 billion (minimum) Trident submarine program is needed because we can hardly expect a submarine crew to go to sea for 60 days in anything but the most modern ship (this at the same time that Trident is promised to replace only 10 of the 41 Polaris/Poseidon ships). It seems that the realities of arms and war are not considered even in the Pentagon, and I can see no greater peril to our national security.

It seems to me that a guiding principle at this time might be inferred from SALT I, namely that the Soviet Union and the United States will undertake not to imperil the survivability of the other's strategic offensive

force. That principle is entirely compatible with militarily useful kinds of flexibility. Emphasis on programs in accord with this principle could lead to greatly improved tactical ASW capabilities on our side, and to the simultaneous reduction in cost and to the improvement in effectiveness of our conventional forces.¹

MUTUALLY ASSURED DESTRUCTION AS A STRATEGIC POLICY

*by Richard Perle**

First of all, it is not the case that the Arms Control Agency is a sacrificial lamb to congressional critics. Senator Jackson says that the trouble is with the Administration's policy, not ACDA. The Agency will continue to play a large role, but it is only sensible to separate the negotiation process from the policy planning process.

Throughout this discussion one must bear in mind that SALT I conferred a large advantage on the Soviet Union, namely a four to one advantage in missile throwweight. My basic point is that the Soviets have passed us in the night. Neither side has any real interest in banning MIRV's. It is said that the United States has a big advantage from the forward basing of its submarines, but the Soviet targeting geography is such that there is no real advantage or, if it exists at all, it will disappear in the near future. Senator Jackson was not alone in advocating his amendment; the Administration went along and supported it. It is a dangerous idea to rely on a launch on warning capability, first because a hair trigger response is conducive to accidents and secondly because missiles which survive a preemptive strike will not necessarily get to their target. In any event, reading Soviet strategic policy according to our notions is dangerous.

As for the agreements reached at SALT I, we gave the Soviets a 3 to 2 ratio in land and sea-based missiles, as well as a 4 to 1 advantage in throwweight, which may increase because the larger Soviet missiles can be upgraded. There is no numerical freeze on independent reentry vehicles. On numbers of missile submarines, the Soviet Union has an advantage of 62 to 41. The Russians are seeking to convert the Interim Agreement to a permanent agreement in order to freeze their advantage and also to limit the U.S. bomber force and forward based systems. The Jackson Amendment simply calls for equality in numbers of launchers, taking into account throwweight. It does not include European systems or technical improvements. The general idea is that there ought to be visible equality in the strategic deterrents, not the least

¹ A more complete statement of this position can be found in R. L. Garwin, *Superpower postures in SALT, An American View* in *SALT: PROBLEMS AND PROSPECTS* (M. Kaplan, ed.) 96-118.

* Of the staff of Senator Henry Jackson.

because politicians who make decisions are impressed by such equality rather than by technical equivalence.

The principal argument that I would like to make is this: the fact that the Soviets agreed to remain vulnerable does not mean that they have accepted vulnerability as a doctrine. Both sides realized that effective ABM systems are not technically feasible or even plausible. However, there are other ways of achieving the same result, principally by a preemptive strike on the opponent's missiles. This brings me to the scenario I would like to discuss. If the Soviets in five or ten years upgrade the accuracy of their missiles, their throwweight, and their MIRV technology, they can attain the possibility of launching a preemptive strike which would destroy all of our land-based missiles and bombers, plus quite a few of our submarines, *i.e.*, those which would not be on station. Only a small fraction of our total capability would remain. What would the U.S. response be? If the effective performance of the remaining forces were in doubt, would the President launch a retaliatory strike or would the President capitulate because of the overwhelming Soviet power remaining?

There is no need to fear that the Soviet Union would actually launch such an attack, but the political consequences of their having such a capability are dangerous because the United States would be restrained from pursuing its worldwide interests as vigorously as it otherwise might. There would undoubtedly be a withdrawal from our overseas interests because our ability to protect those interests would be even less than our power to protect ourselves at home. We would have the situation of the Cuban missile crisis in reverse; in that situation we had a profound political impact because of our strategic superiority.

We do not have any strategic doctrine which enables us to take the new balance into account. Mr. Warnke, for example, has suggested that the United States attempt to reach a freeze on nuclear weapons by imposing a unilateral moratorium on construction of strategic weapons. Such ideas do not square with any recognized strategic theory. However, it is impossible to improve substantially on the present vulnerability of our deterrent either. Another problem of the new balance we have achieved is that we have failed to provide credible protection to Europe under SALT I.

The main question is how we get out of the dilemma posed by the new balance. Given the scenario that I have described, in which it would be unlikely that the President would retaliate after a preemptive strike, we should structure our deterrent so that the whole of the Soviet strategic force would be required in order to destroy our missiles. To reach that posture both sides have to play the same game. One way for us to reach such a posture would be to defend our deterrent so well that the Soviets would have to commit more missiles to wipe it out. We have precluded ourselves from doing this by the way we wrote the agreements that came out of SALT I. The best procedure would be to defend strategic missile complexes with ABM's. The effect of such defense on deterrent survival would be substantial. As an alternative, however, we should press the Soviets to bring their strategic forces down to the level of comparable U.S. forces.

POSSIBLE OUTCOMES OF SALT II

*by Paul Warnke**

It is awesome to consider nightmare scenarios such as Mr. Perle has proposed. The overriding aim of our strategic nuclear policy must be to see that they never become reality. No one likes the idea that our defense rests on the threat of genocide. But no one has yet devised a more effective deterrent. Mr. Perle's suggestions ultimately rest on technological breakthroughs which may or may not happen. However, I do agree that the lessons of SALT I should be borne in mind when making predictions about the outcome of SALT II.

There are three general possibilities as the outcome of the SALT II negotiations. The strategic nuclear situation may get better, it may get worse, or nothing much may change. Given the course of developments since the re-election of President Nixon, this third possibility may be both the most likely and the most desirable. There seems to be little zeal at the highest levels of the Administration for either speed or innovation in further agreements on limiting strategic arms. The team that did the spadework and most of the footwork for SALT I has been largely dismantled and the political imperatives that supplied much of the push behind the first round now seem to be lacking. It may also be that further agreements are more difficult to achieve because of the difference in the structure of forces on both sides.

The major accomplishment at SALT I was unquestionably the agreement significantly to curtail ABM deployments. But this was achieved not only because it made the most eminent good sense, but also because of the growing and informed opposition to any significant ABM construction. The problem with moving to a strategic theory other than mutually assured destruction is that the offense has always been technologically ahead of defense. The ability of offensive missiles to overwhelm any known ABM technology is well recognized. Indeed, the Administration succeeded in getting congressional approval for its "Safeguard" ABM proposals only by claiming that an affirmative vote was necessary in order to attain the progress in SALT that would permit most ABM plans then to be abandoned.

Insofar as the second accord of SALT I is concerned—the interim agreement on control of offensive nuclear arms—the principal plus for the Administration was the limitation in the number of giant Soviet missiles, the SS-9's. Because of the positions taken by President Nixon and Secretary Laird in their earlier public pronouncements, an agreement on limiting the SS-9's had become an essential political concomitant to an agreement on ABM's. Without such restriction, the Administration would have been stuck on the hook of its own rhetoric to the effect that 500 or so SS-9's might give the Soviets a first strike counterforce capability against our land-based missiles. But the ABM now has been virtually scuttled and the existence of a nuclear stalemate has been ratified. Arguments can continue to rage about the practicality or even

* Of the District of Columbia Bar

the morality of a stalemate based on the horror of mutual assured destruction, but that horror exists and can't be made to disappear. What remains to be negotiated are even more difficult issues than those involved in SALT I—and in the absence of any of the compelling political pressures that may well be required for further progress in this complex context.

In these circumstances, the Administration may consciously have adopted a clever course. With a new chief negotiator, who himself is new to the field, and with a restructuring of the Arms Control and Disarmament Agency, the really tough issues may not have to be faced for a good long time. This would be a quite satisfactory solution if both we and the Soviets were to utilize the situation resulting from the existing agreements to scale-down rather than to accelerate the arms race.

A good argument can be made that future progress can come faster and better through mutual tacit restraint instead of striving for formal agreements. With neither side permitted to deploy a thick ABM defense, even a fraction of the existing warheads on each side are sufficient to devastate the other country many times over. Under these circumstances, the investment of substantial further funds in strategic weapons defies common sense. SALT I buys us time and hopefully will not stimulate atavistic fears. However, the time purchased will be worthless if it is used to stimulate new arms programs. One way to avoid Mr. Perle's scenario is to agree on a permanent freeze, although the Soviets may not be willing. If advance agreement is deemed infeasible, an attempt should be made to bring about a freeze by declaring a moratorium on further development of strategic weapons and calling on the Soviet Union to respond in kind. Such a moratorium, even if unilateral, could be continued for an appreciable period of time with not the slightest risk to our national security.

It is difficult to deal with tactical nuclear weapons, those in Europe and on our carriers, in a bilateral setting. The course of past negotiations was long and troubled. We therefore should attempt the kind of initiative used for the Limited Test Ban Treaty. Even if the Soviets maintain their present programs, we will continue to have enough strength to deter a preemptive strike. Insofar as the present balance is concerned, the Soviet missiles are big principally because the Russians do not know how to miniaturize as well as we do. Their throwweight advantage is not militarily significant, nor is our multiple warhead lead, because neither threatens the survivability of the other side's deterrent.

The risk of a further arms race is aggravated, in my view, by any renewal of debate about the adequacy of mutual assured destruction as the criterion for stability and effective deterrence of nuclear war. Admittedly, it is a repellent notion that our fundamental protection against nuclear attack derives from the fear of our potential adversary that we would respond with maximum devastation to his society. But the uncongeniality of this concept reflects the difference in kind between strategic nuclear weapons and even the deadliest conventional armaments. Our conventional forces are maintained both to deter aggression and to resist it successfully if deterrence fails. Against the prospect

of strategic nuclear war, our survival as a modern society requires that deterrence be successful. If it fails, relative nuclear war-fighting capability would be of little interest to those unlucky enough to survive.

A major nuclear strike against another major nuclear power is almost unthinkable, given the present nuclear balance, but even more unthinkable is a limited first strike that would leave the other power able to respond with something tantamount to its maximum capability. No advance commitment to limit our response if an initial strike were confined to our military facilities would be credible to Soviet leaders planning the ultimate depravity of initiating nuclear war. Our prime military targets—the White House and Pentagon—impound the downtown area of a major American metropolis. Rational countercombatant targetting could hardly exclude these main command centers. And if our strategic planning must contemplate the possibility of irrational Soviet decision, no rational basis exists for the assumption that a mad enemy would exercise restraint in his first strike. Neither madness nor malevolent reason thus are consistent with the reciprocal adoption of a “humane” resort to a nuclear war-fighting strategy.

The question whether we would in fact launch after a preemptive strike directed at our missiles is somewhat artificial, because the present accuracy of Soviet missiles makes such a “surgical” strike impossible. The consequences of a “surgical” strike would be indistinguishable to the victim from those of an indiscriminate strike. The American President would have to retaliate if only because of the demonstrated insanity of the Soviet leadership and the consequent need to destroy it. And regardless of what a President might actually do, it is desirable to have an announced policy of full retaliation in order to have maximum deterrent efficacy.

As I see it, the greatest chance of preventing nuclear war, and hence the maximum security, still rests on the maintenance of an assured second strike capability—the secure forces that, even after a Soviet first strike, would be capable of devastating Soviet society. These forces now in our arsenal possess the inherent flexibility of being more narrowly targeted. If necessary, improvements in command and control would permit a less-than-all-out response to a less-than-all-out attack. It is essential, however, that such forces retain the maximum threat and hence the maximum deterrent. But this maximum deterrence can in fact be retained, and even improved, while achieving significant restraints on further development of strategic arms. It cannot be markedly improved by the investment of 10's and even 100's of billions of dollars more in the strategic arsenals of both sides.

On the basis of these assumptions, which I believe to be valid, the primary emphasis at the continuing SALT negotiations should be on limiting qualitative improvements. The interim agreement on offensive arms limitations puts loose but finite limits on numbers of missile launchers. It leaves both countries free to upgrade and modernize existing missiles, to increase numbers of warheads by introduction of multiple independently-targettable reentry vehicles, and to construct additional

nuclear missile submarines through their substitution for some of the older land-based ICBM's. Strategic bombers, our forward-based systems, and Soviet missiles capable of reaching Western Europe but not American soil are uncontrolled.

These loopholes permit the United States to go ahead with its Minuteman III program, substituting MIRVed missiles for those with single warheads and also to continue the conversion of the Polaris submarines to the MIRVed Poseidons. We are free also to proceed with the multi-billion dollar giant submarine program, the Trident, as well as to build the B-1 manned bomber at a cost of many additional billions. And the Soviets are free to develop, test, and deploy their own MIRV's.

None of these developments will leave the nuclear balance any more stable. None can give either country any meaningful edge in strategic weapons. If history is any guide, none will give either country anything that is exploitable to its military or political advantage.

As I have previously suggested, both countries would gain from a freeze, not only quantitative but qualitative in nature. A possible obstacle to such a freeze is our lead in MIRV's. But the Soviet Union reportedly has indicated some interest in talking about MIRV limitations. And a freeze now would leave the USSR with greater throwweight and megatonnage in its missiles as at least some colorable offset to our large lead in warheads.

Perhaps the most acceptable and verifiable means of achieving a qualitative freeze would be through restrictions on testing. At its present stage of development, the Soviet MIRV program cannot be completed without extensive tests. The new longer range missiles for our proposed Trident fleet could not be considered militarily reliable in the absence of testing. Perhaps the most feasible means of effective arms limitation is thus to avoid the vexing problems inherent in attempts to control specific weapons systems by opting instead for the route of a comprehensive test ban. A resolution calling for such a proposal has been introduced into the U.S. Senate by Senators Humphrey, Kennedy, Mathias, Hart, Muskie, and Case. Senator Humphrey's introductory statement points out that new seismic equipment now gives us a monitoring capability which is far superior to the verification potential of on-site inspection.

If the CTB approach proves too bold, full exploration should be made of the chances of tight restrictions on flight testing as a means of inhibiting qualitative improvements, including the development of the greater accuracies that might be destabilizing because they portend an effort at a first strike capability. And as suggested earlier, such greater accuracy would not preclude the targeting of urban populations.

There are other moves that would both yield economies and improve the stability of the nuclear balance. One would be to work toward the reduction and eventual phasing out of land-based ICBM's. Because of their greater vulnerability, they present the more attractive targets for an attempted preemptive strike at a time of extreme international crisis. The primary reliance would then be on the underwater fleets

that provide an effective deterrent because of their enormous destructive capability but which lack the individual warhead megatonnage and accuracy for a first strike potential.

A complementary step would be to introduce restrictions on antisubmarine warfare systems. On any known technology, the nuclear missile submarines are now invulnerable as a second strike force. But limitations on developments in antisubmarine warfare would lessen lingering apprehensions about possible breakthroughs and would also diminish the force of arguments for indefinite retention of our present strategic triad by measures to protect land-based missiles, for example, by site defense.

There is no shortage of innovative opportunities in SALT II. The present strategic nuclear situation can be improved. What is essential, however, is that it not be made worse. Because of the tight limits on ABM deployment, both sides now have strategic sufficiency, no matter how that term may be defined. Under these circumstances, it would be both profligate and dangerous to our national security to adopt a course of action whereby new and unneeded strategic weapons programs are initiated and justified as bargaining chips for the on-going negotiations. We would be far better off to let well enough alone on the negotiating front and to take an initiative that could lead to mutual restraint.

The CHAIRMAN opened the discussion for comments and questions from the floor.

Asked his opinion of the Trident and B-1 bomber programs, Mr. PERLE felt that we needed follow-on programs for our nuclear submarines and strategic bombers, but he declined to comment on the design or capabilities of the current proposals. To a second question whether, even if the throwweight disadvantage is considered, it wasn't possible to give the U.S. MIRV capability a first strike potential, Mr. PERLE observed that the Soviets will also have MIRV technology in the very near future, offsetting our advantage.

Commenting on Mr. Perle's scenario, Mr. GARWIN asked what the President would do if a preemptive strike were launched against, say, five of our cities, with a threat that the others would be destroyed if we didn't capitulate. Is this much different from Mr. Perle's scenario? Mr. PERLE questioned why a Soviet leader would destroy 20% of our population. Mr. GARWIN responded that they might do so for the same reason that they might destroy our retaliatory forces. If the Soviets thought the United States was unwilling to respond, they could go ahead with a partial attack now, which they have not done. The real objection of many critics of mutual assured destruction is that they see it as morally repugnant, but they mask this view by the argument that assured destruction is not *effective*. Looking carefully at the agreements, he added, one finds that they don't freeze throwweight at all. We could upgrade our Minutemen to SS-11 size and by improved technology increase their payload by a factor of three or four. We also have monster missiles, the Titans, equivalent to the Soviet SS-9's in size.

To a question on the impact of the developing Chinese nuclear capability on strategic arms discussion, Mr. WARNKE replied that they are not affected at all. It is estimated that the Chinese might have an ICBM in seven years, but the Chinese threat is so small that any limitations we are considering would not be affected by any possible Chinese threat. If we reach a more civilized situation in the future, we would hope that the Chinese will have progressed also. Mr. RHINELANDER agreed. The difference between the United States and the USSR on the one hand and China on the other is enormous. Our estimates of Chinese capabilities are becoming progressively more modest, and the Chinese are just not in the same league. Mr. PERLE thought the Chinese were a healthy influence on the SALT negotiations because of the Soviet concern about them. This concern is in our favor because it gives us a little leverage to get a European-oriented SALT agreement. Mr. GARWIN thought that the Chinese will be able to do significant damage to the United States but are deterrable. He remarked that we have to be willing to live with a little uncertainty.

As to the real significance of budget cuts and personnel changes in ACDA, Mr. PERLE believed that much of the funding should be restored. As for the personnel changes, many good people are leaving ACDA, but many good people are also arriving.

The panelists were asked whether any of them had given consideration to the idea of the doomsday machine, which was current a few years ago, *i.e.*, a system of weapons rigged to go off if there are as many as three nuclear explosions anywhere in the world? Mr. WARNKE observed that one serious problem relevant to the doomsday machine idea is the proliferation problem which raises the threat of less rational fingers on a multiplicity of triggers. The doomsday machine thus might not bear the same relationship to the multilateral situation as the mutually assured destruction capability does to the bilateral situation.

The question was raised as to how realistic Mr. Perle's scenario was. To what extent do the Soviets have the capability to inflict such damage that our retaliatory force could be largely destroyed? Mr. PERLE replied that at present we have sufficient weapons to inflict unacceptable damage even after a first strike, but the throwweight of the Soviet missile force is such that if they were to maximize their advantage they could destroy our deterrent. However, he was not so much concerned with an actual attack as with the political effect of such a potential. Mr. WARNKE was troubled by the fact that we couldn't do anything about a preemptive strike even if we had more forces. Defending missiles just increases the threat against our population. Mr. RHINELANDER considered the scenario totally unrealistic. The assumption of a coordinated strike by the Soviets against *all* of our deterrent forces with no warning is very unrealistic. The scenario also implies a clean strike with little population damage, but the radiation effects of nuclear explosions create a serious flaw in such an assumption.

A member of the audience commented that verification by national technical means seemed to be the basis of the SALT I agreements and appeared to be just as important for SALT II. What are the possibilities, he asked, for verifying limitations on qualitative improvements, such as MIRV's, from satellites? Mr. PERLE felt that the logic implicit in the views of the other members of this panel was that verification is not important because the numbers don't really matter all that much. Mr. WARNKE stated that it does make a difference whether the other side cheats. Some people on either side will always place value in numbers, so that acquisition of MIRV's by one side would have to elicit some response from the other side. But in effect it doesn't matter too much, because even if the USSR had MIRV's and destroyed quite a bit of our forces, we would still have sufficiency. Mr. RHINELANDER observed that there are two aspects to verification. We have the capability of monitoring Soviet testing and we can observe when they are testing MIRV. We can't tell whether MIRV's are installed on any given missile if the missile with and without MIRV is identical, but the observation of testing provides a great deal of information. Limitations on testing could be verified and would be very helpful.

The question was raised whether the United States should share nuclear technology with Japan now that its self-defense forces were being built up because of the Russian and Chinese threats. Mr. WARNKE's view was negative. Possession of nuclear weapons by Japan would be destabilizing, would be generally bad for Japan, and specifically would slow its economic growth and impede its international acceptance. Unless Japan acquires a nuclear capability it really doesn't have to worry much about the Soviet Union or China. Mr. PERLE pointed out that if it were really the case that the United States would enter a nuclear war to defend Japan, our entire strategic thinking would have to be revised. Mr. WARNKE added that regardless of our real intentions, the Soviet Union could never be sure that the United States would not retaliate against an attack on Japan.

FREDERICK WILLIAMS
Reporter

THE FUTURE OF THE "SOCIALIST COMMONWEALTH": PROSPECTS FOR LEGAL AND INSTITUTIONAL DEVELOPMENTS IN RELATIONS AMONG THE COMMUNIST STATES

The panel convened at 2:30 p.m., April 12, 1973, Leon Lipson* presiding.

* Yale Law School.

THE IMPLICATIONS OF THE 20-YEAR COMPREHENSIVE
PROGRAMME OF ECONOMIC INTEGRATION

*By George Ginsburgs**

The adoption of the "Comprehensive Programme for the Further Extension and Improvement of Cooperation and the Development of Socialist Economic Integration by the CMEA Member-Countries," to quote the document's full title, opens a new chapter in the history of the self-styled "Socialist Commonwealth." Two years on the drawing board, the 25,000-word encyclical is a strange mixture of ideological clichés, abstract formulations of political, economic, and juridical desiderata, projections of distant ends, references to proximate objectives, and elaborations of the concrete ways and means by which the next plateau on the road to the Communist millenium shall be reached. Approved at the 26th session of the Council for Mutual Economic Assistance (CMEA) which met July 27-29, 1971, and subsequently ratified by the top political organs of the member states, the program enjoys locally the formal status of a multilateral treaty whose principles validly bind the CMEA partners to a general code of conduct aimed at achieving certain select goals by various designated methods. At the same time it represents a theoretical blueprint of how the leaderships of the countries concerned would like the region's economic organism to perform in an optimal setting and how they propose to bring that situation about.

The text makes clear that the current dedication to the task of promoting further cooperation and integration in no sense means the abandonment or downgrading of the parties' traditional commitment to maximum respect for and observance of the canon of state sovereignty. New organizations may have to be formed to direct and channel these activities and to administer and regulate future collaborative efforts, and the role and powers of the existing institutions may have to be reenforced and expanded in tune with their latest assignment, but, the charter emphasizes, such arrangements will entail the creation of interstate entities only, and the inauguration of supranational bodies in this connection is expressly precluded. Herein, the Soviet lawyers and their East European allies insist, lies the key difference between the socialist and capitalist experience in this field. Pursuant to their version, capitalist attempts at crossnational integration automatically involve wholesale violations of the sovereign prerogatives of the smaller or weaker states by their larger or stronger associates, often through the media of supranational organizations applying the rule of majority vote, weighted ballots, and similar devices. Socialism alone, so runs the thesis, can handle the harmonious accommodation of international and national impulses and advance the cause of international integration without either sacrificing or trampling upon the component national interests.

* New School of Social Research.

The official picture conveys the impression of perfect and enduring compatibility between the dual elements of the equation. The outside observer, however, may well be excused for wondering by what precise mechanisms the competing priorities of the two polarities can thus be reconciled and permanently kept in flawless balance. Communist spokesmen leave no doubt that the progress of the present venture is squarely predicated on three notions: the incremental growth of the authority and jurisdictional circuit of the grid of interstate organizations forged to service the needs of the evolving community; the steady rise in the importance of the functions, duties, and responsibilities entrusted to the care of these agencies; and the consistent increase in the number of problems whose solution will with time be sought at the international rather than the national level and through resort to collective instead of individual resources.

The premise that this hemorrhage can persist without ever producing nexuses of serious tension strains ordinary credulity. Indeed, circumstantial evidence even now suggests that an effort is afoot to insinuate a series of internal adjustments of a doctrinal and operational nature intended to reflect and buttress the gradual shift of the center of gravity closer to the international extremity of the spectrum. Since CMEA stands at the hub of these developments, its constitutional visage mirrors best the stresses of this marathon tug-of-war. Quite obviously, an institution dedicated to the a priori proposition that political consonance must reign among its members, which accordingly subordinates its decision-making process to the imperative of unanimity, lacks the indispensable flexibility to cope with novel conditions marked by a distinct, albeit relatively muted, spirit of intramural one-upmanship. Adequate perhaps for a static situation, such a *modus operandi* can hardly hope to fit the exigencies of a fluid and dynamic environment.

Two random samples from the literature on CMEA will help illustrate the kind of discreet, not to say subterranean, tactics which are being tested for the purpose of enhancing the organization's effectiveness as a vehicle of regional synthesis and of bolstering its personal status as a logical step in that direction, while at the same time avoiding any imputation of seeking to revise the statute or doing violence to the dogma of state sovereignty. In virtue of the institution's bylaws, if a member state declares that it is not interested in a particular issue scheduled for discussion, it need not attend the deliberations and will not in any way be bound by whatever decisions are taken. It may subsequently change its mind and join the group, but, unless it does so, the ensuing agreement, as far as it is concerned, is strictly *res inter alios acta* and can confer no rights or obligations beyond the radius of the immediate constituency. Consider the scheme's implications. Let us imagine that three or four members of the organization wish to boost concerted cooperation or integration in a given sector only to find that a sister state, whose inclusion is for objective reasons crucial to insure the genuine success of the enterprise, merely announces that it is not interested in this agenda item and, hence, expects to incur no responsibilities as

a result of the whole business. Thus, without breaking a single rule, a member state can thoroughly sabotage the efforts of the rest of the club to achieve a consensus on questions of corporate importance by the simple expedient of withholding its strategic share of the common contribution.

To get around this difficulty, some local legal experts urge the introduction of scientific criteria to determine whether or not a state has a residual interest in a specific topic in lieu of the current purely discretionary method of ascertaining each member's sentiments every time a concrete proposal is under study. Granted this alternative runs afoul of the danger of the liberum veto, but presumably the idea of overtly opposing a constructive plan without compelling motive or on dubious grounds would not carry much appeal whereas by just contriving not to engage in dialogue from the start the maverick can avoid the opprobrium which the phenomenon of a lone dissident often attracts.

Or, look at the procedure by which the recommendations of the CMEA's organs are now translated into norms binding upon the interested parties. The recommendations themselves usually represent broad policy guidelines which, if adopted unanimously by the states concerned in the corresponding forum, are then transmitted to the home governments for additional approval. Once ratified in accordance with the relevant domestic prescriptions, the respective bill still does nothing more than impose on the competent authorities the duty to negotiate in good faith with an eye to the early conclusion of detailed agreements destined to fulfill the animus and substantive tenor of the primary recipe. No provisions exist for enforcing compliance, either with the object of inducing willingness to abide by the initial pledge to negotiate, *i.e.*, to live up to the terms of the contract, or with the object of guaranteeing the congruence of the contents of the final accords with the essence and letter of the original instructions.

The defect is inherent to the genetic pattern of the CMEA family of organizations and no easy answer to the present dilemma is in sight. The sole consolation and advice that the local legal profession can offer under the circumstances is to propose that the valid recommendations of the CMEA's organs themselves be elevated to the rank of legally binding compacts so that nonperformance of their stipulations would *ipso jure* constitute a routine violation of a standard international agreement. Aside from betraying the doctrinal inhibitions which fetter the champions of this approach, the projected solution holds out scant promise of relief and simply conjures up a different set of problems. The real solution, of course, lies in vesting the organization with power to issue mandatory directives by majority vote and enforce them, if the occasion arises, by inflicting appropriate sanctions. Since the formula flatly contradicts the core assumptions of the modern Marxist credo in this domain, chances are remote that the concept will soon win endorsement in Communist quarters.

On the other hand, the fact that one sometimes stumbles even in "socialist" legal writings across terse statements hinting at the pressing

need to overhaul the current machinery and fleetingly mentioning the advantages accruing to the majoritarian rule points to latent awareness of the malign effects in this instance of blind deference to the gospel of state sovereignty. So do a few other modest straws in the wind, such as the fractional dilution of the once absolute adherence to the principle of unanimity encountered in the charter of the new International Investment Bank, which seems to intimate that the "commonwealth" may slowly and painfully be edging toward a more unitary structure, although the official record here is still far from encouraging. In sum, by what practical artifice the Communists will yet extricate themselves from the tangle is not at all apparent, but without doubt this Gordian knot confronts them with a truly critical choice, the outcome of which will vitally affect the profile of the "socialist commonwealth's" future itinerary.

Needless to say, tinkering with the available equipment in order to improve the quality of its performance is only part of the general picture. The elaboration and adoption of the Comprehensive Programme both coincided with and lent extra impetus to the establishment of additional regional agencies. Rapid numerical expansion has been accompanied by increased proneness to experiment with a variety of fresh styles and formats, since the latest tasks of accelerated cooperation and integration could not be handled through the classical medium of intergovernmental agencies, no matter how many of them were created. Instead, the situation called for a judicious combination of horizontal spread and vertical penetration, *i.e.*, a thicker institutional weave at the interstate level coupled with a pervasive system of operational linkages at the inferior echelons. As a result, the organizational inventory has mushroomed. Thus, the "socialist commonwealth" today owns an impressive stable of regular intergovernmental and nongovernmental entities. Their status is relatively clear and raises no major legal difficulties. The real innovations occur lower down.

Recent years have witnessed a remarkable proliferation of the network of compacts concluded directly between ministries, departments, scientific research institutes, and economic units committing the parties to long term collaboration in various fields: (1) in analyzing and solving key problems of science and technology and studying the feasibility of their application to industry; (2) in pooling their manpower and economic resources for the erection of mammoth projects designed to service the needs of all the investing countries; and (3) in devising arrangements for division of labor in respect to specialization in the manufacture of complete pieces of equipment and the coproduction of finished items through individual assignment of responsibility for the output of component parts to enterprises operating in different countries, with the final assembly to take place at a central location picked beforehand.

Local legal circles face a herculean job in trying to fit these developments into a coherent juridical pattern. Even a quick review of some of the highlights of the emerging agenda can convey no more than a tentative idea of the magnitude of the task ahead. For example, earlier

in the game, Khrushchev had sought to introduce a central system of regional planning within CMEA. The scheme met with resistance and had to be abandoned. His successors did not revive it, but CMEA has since been supplied with a standing Committee for Cooperation in Planning which is charged with the business of effecting the prospective synchronization of the activities of the member states in this field. Getting the eight national economic blueprints to mesh with one another is just the first step, however, for thereafter the myriad routine operations of the subordinate units of administration, trade, and production must also be regulated in such a manner as to ensure that their performance will contribute to the fulfillment of the common goals. In the process, each state assumes a basic obligation vis-à-vis its partners to see to it that its domestic mechanism functions properly so as to be in a position to turn out and deliver on schedule the commodities and services that the rest depend upon.

The legal aspects of state responsibility in this context remain a dark mystery since the question has never before been considered. At this juncture, it is a priority item and the Soviet and East European legal colony is laboring overtime to find suitable answers.

By the same token, up until now economic exchanges between CMEA's members had been handled through normal trade channels and treated as ordinary commercial transactions. The state rarely intervened in these affairs in its public capacity. Liability rested totally with the competent organizations themselves which, for these purposes, possessed the usual attributes of a juridical person in civil law. Any disputes relating to the mode of performance of the pertinent agreements could, *ultima ratio*, be referred to commercial arbitration for settlement. As against this, a consensus now prevails among Soviet and East European legal experts that major international projects of economic, scientific, and technical cooperation within the "socialist" community ought to be governed by interstate agreements, supplemented by the necessary quota of compacts between the assorted entities associated with the implementation of the separate provisions of the parent accord.

Again, an element of state responsibility is entailed in the failure by the state organs concerned to police or supervise these ancillary units as a consequence of which the commitments assumed under the primary agreement are not carried out. That jural teaser, as already mentioned, still awaits unravelling. For that matter, no decision has yet been reached on the subject of what forum will be qualified to rule on the issue: a few spokesmen from the area have expressed support for a special court as a CMEA organ; some of their colleagues have indicated a preference for international, interstate arbitration.

In addition, since the interested manufacturing enterprise may not be authorized to venture into the foreign trade arena under its own name, specialized foreign trade organizations enter the picture to make certain that the goods contracted for duly arrive at their destination. Here, too, lines must be carefully drawn to pinpoint who will be held

accountable for what and to what extent in case the execution of the terms of the compact is marred by controversy.

On the other hand, significant progress has been recorded on an adjoining front. As long as relations between CMEA's members fell essentially under the heading of trade operations, the technique of ordinary commercial arbitration sufficed to deal with ensuing conflicts which resisted efforts at amicable conciliation. By contrast, the dynamics of co-production, joint research, the performance of scientific and technical services, the supply of equipment, labor, and know-how in connection with engineering and construction projects are regulated by the norms of civil law. The existing national arbitral boards thus had no jurisdiction in this domain. The parties were unwilling to let the courts handle the traffic, so they hit on the alternative of expanding the competence of the permanent foreign arbitration commissions sitting in each member country. A convention was correspondingly signed in 1972 by which these tribunals acquired the right to hear disputes between economic organizations arising out of civil law compacts on economic and scientific-technical cooperation. A central arbitral board endowed with comparable powers and attached to CMEA may well be in the offing.

The emergence of sub- and nongovernmental agencies as autonomous actors in sundry sectors of intrabloc diplomacy has played havoc with a number of traditional views on legal doctrine espoused in Soviet and East European circles. For example, the present phenomenon casts in sharp relief the urgent need to spell out the mechanics of the process by which international legal norms are translated, whether by reception or transformation, into binding rules of municipal law and how they generate rights and duties within the domestic sphere of the individual member of CMEA's constituency. Communist jurisprudence has never furnished a satisfactory explanation on that score. The subject elicited a great deal of dialectical casuistry and obscurantism and whatever theories were spun out in the past to match established policies do not fit today's realities.

Much the same can be said about another vexing problem with important practical implications, namely, the prevailing confusion around the whole business of the formal hierarchy of legal norms in the domestic systems of the countries concerned. The roster of organizations which are entitled to negotiate and sign international agreements has grown severalfold in the last few years. The scope of their respective competence in this sphere fluctuates widely; they differ in status and rank and, quite naturally, their authority to issue mandatory prescriptions also varies commensurately. Where do all these rules stand vis-à-vis one another? Which set of directives commands precedence in a particular instance? What should be done if they turn out to be incompatible? What happens when an organization acts *ultra vires* abroad and its foreign commitments cannot be honored at home because they conflict with a superior norm? These are not idle questions.

Appropriate solutions will have to be painstakingly worked out and, since the difficulties tend to multiply with every passing day, the situation brooks no delay.

Finally, structural asymmetry between the partners causes its share of legal headaches. The Russians, for instance, look upon the state as an indivisible unit, which means that state organs, regardless of their position or denomination, can only function in a public capacity and thus retain all the privileges and immunities appertaining to their sovereign character. Armed with this shibboleth, Soviet sources then note the tremendous disparity in legal status of the partners in what they call a "diagonal" relationship, *i.e.*, an association between a non-state entity whose legal complexion is defined by civil law and a state institution which operates as an international legal person. The question of how to rectify the imbalance, either by supplying a private proxy for the state agency or formulating interstitial legal principles which would provide a common meeting ground, likewise comes near the top of the local legal profession's shopping list.

In sum, Soviet and East European lawyers certainly cannot complain that the "socialist commonwealth's" travails do not keep them gainfully employed.

It is fashionable in the West to belittle the pace and extent of the progress registered to date by the USSR and its East European allies in forging a unified institutional apparatus on a regional scale. The judgment, in my opinion, is both unfair and incorrect and stems from a fundamental misapprehension of the attitudes, motives, and methodological preferences of the people running the experiment. Most Western observers are blinded by the image of regimented energy and single-minded purposefulness that Communist political systems tend to exude. These assumptions feed and inflate a permanent sense of expectation of virtuoso performance: with all that will, force, unity, and wealth, all barriers must quickly fall and new records forthwith be posted. What is forgotten is that the ability to mobilize resources of such magnitude dictates a proportionate degree of caution in their utilization.

Communist analysts are forever emphasizing the intrinsic difference between the capitalist and socialist concepts of international integration. The capitalist world fosters intramural integration by defining the official parameters and by regulating and policing the channels of economic flow, but private enterprise is left to determine in its own spontaneous and sporadic manner the ultimate thrust, speed, density, and composition of the bloodstream. Its socialist opposite puts its faith in a planned, organized approach based on the principle of direct central control of every important lever and gear in the machine. The operational details are fixed in advance and then solidified into legal precepts. The bourgeois universe can afford a relaxed, casual, ad hoc style since the vague, general instructions by which it tries to influence and guide the process can always be reinterpreted or reversed without fear of triggering an avalanche. By contrast, the steps initiated within the socialist fraternity to promote community integration are by nature and definition more

conclusive, rigid, and irrevocable except at the risk of incurring major disruptions. Hence, one must move with greater care and foresight, with full appreciation of the size of the requisite investment and of the relative finality of the adopted solution. The Comprehensive Programme surely bespeaks the depth and genuineness of the Soviet commitment to the success of the present venture, which means that every effort will be made to avoid serious pitfalls while pushing ahead with all proper deliberation. In short, where conscious politics, not instinctive economics, take command, the chosen vehicle's engine will be more powerful and will be able to inch across otherwise virtually impassable terrain, but once launched on its trajectory it will possess only limited ability to veer to the right or to the left and no means of turning back altogether. Of course, if the impetus is lost, the juggernaut will grind to a halt, stagnate, and eventually fragment.

Today, the "socialist commonwealth" is a going concern. It now generates an impressive amount of its own centripetal voltage. Barring unforeseen adverse political developments of dramatic proportions, the current momentum will undoubtedly carry the interested countries through the phase of incremental rapprochement to and over the threshold of organic confluence. Should that happen, however, credit will be owed exclusively to the willingness of those responsible for stagemanaging the affair to ignore or circumvent the prescribed constitutional forms, since the latter's sole contribution to the experience, as far as one can tell, is to curb and hinder the existing stimuli toward convergence. True symbiosis must transcend the compartmentalized cellular structure of sovereign egocentricity. Until then the people involved must be aware of and take into account the fact that form is not a passive element: it can be infused with undesirable substance or may offer pernicious dissent a convenient legal plank from which to sow discord or engage in impunity in perverse defiance of the will of the majority. As the Albanian example illustrates, excessive catholicism in deferring to or, conversely, invoking the regalia of sovereignty may well lead to a situation where the only alternatives available are paralysis or expulsion, and neither prospect is especially attractive. Meanwhile, the official rhetoricians will continue to chant praises of sovereignty and the practitioners will continue to seek discreet opportunities to steer the corporate ship clear of the shoals of fractious nationalism which prostrates itself before the self-same idol. Verily, the dialectic sometimes moves in a mysterious way its wonders to perform.

COMECON AND THE UNIFICATION OF INTERNATIONAL TRADE LAW

*By Thomas W. Hoya**

COMECON has achieved a goal long sought by the West: putting into effect a broad unification of international trade law. In 1958 each

* Department of Commerce.

COMECON country adopted the COMECON General Conditions for the Delivery of Goods. Since then the General Conditions have regulated with the force of law every contract for the sale of goods between the COMECON countries. These General Conditions are a broad unification of both substantive law and conflict of laws rules.

The West—that is, Western Europe and the United States—and other international groups besides COMECON have expended vast efforts to unify the law of international sales of goods, the heart of international trade law. The actual unification of law produced by all these efforts has, however, fallen far short of that attained by the COMECON General Conditions. Those efforts at a wide-ranging unification of law have met with a failure of most of the participating countries to accept the unifications that have been drafted. Other efforts at unification have been sharply restricted in scope, such as the preparation of standard terms and form contracts for the optional use of contracting parties.

The main Western, and international (aside from COMECON) effort at a substantive unification of international sales law are two 1964 uniform law conventions promoted by the International Institute for the Unification of Private International Law (UNIDROIT): the Convention Relating to a Uniform Law on the International Sale of Goods and the Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods. Both conventions emerged finally from a 1964 diplomatic conference held at The Hague, which was attended by twenty-eight states.

Notwithstanding all this effort, it was not until 1972 that either convention received ratification by the minimum of five states required for it to come into force. Both conventions went into effect in August 1972. Two of the states that ratified the conventions—the United Kingdom and Belgium—ratified the more important Convention Relating to a Uniform Law on the International Sale of Goods, with a significant reservation. Pursuant to the reservation, these states will apply the Uniform Law only to contracts in which the parties have chosen it as the law of the contract. As to the effect on actual trade of these two Uniform Laws, it is too early to tell.

Along with UNIDROIT's efforts at substantive unification, the main Western and international (aside from COMECON) attempt at unification of private international law are three conventions sponsored by The Hague Conference on Private International Law: These three are the Convention on the Law Applicable to International Sales of Goods (June 15, 1955), Convention on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods (April 15, 1958), and the Convention on the Choice of Court (November 25, 1965). Of these three, only the first has entered into force.

Other important efforts toward unifying the law of international sales of goods have focused on narrower subject matters and have been less predominately Western in origin. INCOTERMS 1953, sponsored by the International Chamber of Commerce, are a set of rules for the interpretation of nine frequently used trade terms relating to the delivery of goods

and the allocation of costs, such as f.o.b. and c.i.f. INCOTERMS apply only if the contracting parties refer to them in the contract.

The General Conditions of Sale and Standard Forms of Contract, prepared by the UN Economic Commission for Europe, also apply only if used by the contracting parties. These standard contracts have been issued, beginning in 1953, for the sale of cereals, for transaction relating to plant and machinery and durable consumer goods, and for the sale of various other goods. The working parties that developed the standard contracts included representatives of both market economies and centrally planned economies.

These, then, are the main attempts by the rest of the world to do what COMECON has done through the General Conditions in unifying the law of international sales of goods. Clearly none of these attempts by the rest of the world represents anywhere near the actual unification of law achieved by COMECON's General Conditions.

The COMECON General Conditions—Character and Purpose: The COMECON General Conditions, adopted in 1958, were amended in 1964 and significantly revised and enlarged in 1968. They are exceedingly broad in coverage. For the sale of every kind of tangible goods between the COMECON countries, they regulate most matters from formation of the contract to its performance or breach, and for the few matters not regulated directly, they provide a conflicts reference to the substantive law of the seller's country. The COMECON General Conditions also have the force of law; that is, they regulate every sale of goods contract in COMECON foreign trade regardless of whether or not they are referred to in the contract or adopted by the contracting parties in any other way.

The COMECON governments, because they participate more directly in foreign trade than market economy governments, had a stronger interest than market economy governments in unifying their international trade law. Each COMECON government plans its COMECON foreign trade by signing a bilateral intergovernmental trade agreement with each of its COMECON trading partners. The trade is carried out, however, not by the government itself but by juridically independent state corporations. These state corporations, like Western market economy corporations, are independent legal persons that enter into civil law contracts and may sue and be sued at home and abroad. For every delivery of goods indicated in a COMECON bilateral intergovernmental trade agreement, a contract is negotiated by a corporation from one of the countries with a corporation from the other.

Foreign trade within COMECON is thus planned by the governments through their bilateral agreements and actually conducted by the state corporations through their civil law contracts. It is these civil law contracts that the General Conditions regulate. Since the governments rely on the corporations for fulfillment of the planned foreign trade, the governments sought to facilitate the corporations' conclusion and performance of contracts by unifying the governing commercial law. The effectiveness of the unification was assured by enacting the General

Conditions into law rather than providing them simply for the optional use of the corporations.

The values provided by the General Conditions' unification of law are, of course, fully meaningful to Western and other countries. Insofar as the General Conditions unify substantive law, they eliminate the need for the state corporations of each COMECON country to know the relevant law of every other COMECON country. Some provisions of the General Conditions resolve problems that the contracting parties might otherwise overlook. Other provisions resolve buyer-seller differences in a more equitable manner than might be attained in every individual contract negotiation. For substantive law not unified, the conflicts reference to the substantive law of the seller's country resolves a problem that could prove troublesome in actual contract negotiations.

One secondary value of the General Conditions is unique to centrally planned economies. Occasionally a state corporation in a COMECON country might be tempted to avoid a delivery specified in an intergovernmental agreement when it could negotiate a more advantageous deal for these same goods with a party in some third country. Were it not for the General Conditions' mandatory determination of most of the commercial terms of every foreign trade contract within COMECON, the corporation could try to use failure to agree on contract terms for the delivery specified in the intergovernmental agreement as an excuse to avoid the planned transaction. Such avoidance would disrupt the planned foreign trade. Because of the General Conditions' prescription of basic contract terms, however, this contract avoidance device is not readily available to the corporations.

Content of the COMECON General Conditions and UNIDROIT's Uniform Laws: In terms of basic concepts, the COMECON General Conditions and the West's main effort at substantive unification of the law of international sales of goods (UNIDROIT's two 1964 Uniform Laws) are similar. Both the General Conditions and these Uniform Laws regulate in roughly comparable ways matters such as formation of the contract, obligations of the seller for delivery and quality of the goods, obligations of the buyer for payment, breach of contract, remedies for breach, and *force majeure*.

The General Conditions are slightly longer than the Uniform Laws combined, not because they normally regulate in more detail the subjects they cover in common with the Uniform Laws, but rather because the General Conditions also cover subjects not included in the Uniform Laws. Subjects covered only in the General Conditions include packing and marking, technical documentation, shipping instructions and notifications of delivery, arbitration, and a statute of limitations. The provisions for payment in the General Conditions are also much longer than the payment provisions in the Uniform Laws because the General Conditions prescribe in detail the procedure for payment through the state banking system in the COMECON countries and through the COMECON International Bank for Economic Cooperation.

Two differences in approach between the General Conditions and

the Uniform Law on the International Sale of Goods can be found in their references to national laws and in permission to contracting parties to depart from the unified law. The Uniform Law excludes reference to private international law and instead refers, for the resolution of "[q]uestions concerning matters governed by the present Law which are not expressly settled therein," to "the general principles on which the present Law is based." Thus the Uniform Law attempts, for the matters that it governs, to be a reasonably self-contained legal code.

The General Conditions, on the other hand, refer to the substantive law of the seller's country for the resolution of questions on matters governed but not settled in the General Conditions. Such a conflicts reference to the substantive law of the seller's country is also contained in the Hague Convention on the Law Applicable to International Sales of Goods. COMECON was motivated in part by a desire to harmonize the General Conditions with this convention. This same conflicts reference is contained in the arbitration clauses of some of the General Conditions of Sale and Standard Forms of Contract prepared by the UN Economic Commission for Europe. COMECON has thus far not adopted a suggestion by at least one distinguished COMECON jurist to make the General Conditions self-contained by referring their unsolved problems to "the general goals toward which the General Conditions are directed," rather than to the seller's law.¹ The objection has been that such "general goals" would prove too vague in practice, which is, of course, the criticism levied by Western jurists at the Uniform Law's reference to "general principles."

The Uniform Law on the International Sale of Goods allows the parties to exclude its application in whole or in part. The General Conditions, by contrast, severely restrict the parties' right of exclusion. The parties cannot exclude the application of the General Conditions in its entirety. They can exclude individual imperative provisions of the General Conditions—and most of the General Conditions provisions are imperative—only with a justification grounded on the special nature of the contractual goods or their delivery and an arbitration tribunal will declare invalid such an exclusion not justified by an objective standard. The COMECON governments chose this strict policy against exclusion because they thought that the General Conditions normally provide the state corporations with sounder contract terms than the corporations would draft on their own.

As to substantive provisions, the General Conditions and the Uniform Laws are basically similar on formation of the contract and obligations of the parties. One difference is that under the General Conditions an offer is irrevocable for thirty days unless otherwise stated, whereas under the Uniform Laws an offer is generally revocable. Also the General Conditions contain a statute of frauds and a parol evidence rule, each of which is absent from the Uniform Laws. In both the General

¹ L. Lünz, *MEZHDUNARODNOE CHASTNOW PRAVO—OSOBEENNAIA CHAST'* (Private International Law—Special Part) 126 n. 3 (1963).

Conditions and the Uniform Laws, risk passes on delivery and delivery occurs when the goods are handed over to a carrier for transmission to the buyer except, under the General Conditions, that delivery may occur at the national boundary of the seller's country in carriage by rail and by motor vehicle.

A difference in underlying approach appears in the remedies provided for breach of contract. The General Conditions are intended to facilitate fulfillment by state corporations of the intergovernmentally planned foreign trade. Therefore a delivery of goods, even if imperfect in some respect, is preferred to rescission of the contract and in the resolution of money claims the emphasis is on speed and simplicity so that efforts will be expended in completing the physical delivery rather than in legal litigation. To encourage actual delivery, the General Conditions sharply restrict the buyer's right to reject the goods. To encourage quick resolution of money claims for a defective delivery or defective goods (that may accompany demand for specific performance), the General Conditions provide, as the basic remedy, payment of a penalty of up to 8% of the value of the goods affected by the defect. Payment of damages compensation was rejected as the basic remedy because of its time-consuming and complex proof problems.

The Uniform Law on the International Sale of Goods does not have this same incentive to stimulate completion of contractual deliveries or speed and simplicity in resolving disputes. Consequently the Uniform Law, restricts the buyer's right of rejection more than the U.S. Uniform Commercial Code but distinctly less than the General Conditions and it awards specific performance less liberally than the General Conditions. Damages compensation is a basic remedy under the Uniform Law, which contains no general provision for payment of a penalty. The General Conditions, on the other hand, have no general provision for damages compensation, although damages can sometimes be obtained by reference to the substantive law of the seller's country.

One other difference in remedies relates to protection afforded the seller. This subject receives serious attention in the Uniform Law in order to protect the seller from nonpayment by the buyer. In the General Conditions, by contrast, it is given only minor attention because of the protection afforded the seller by the intergovernmental payment system. Pursuant to this system the seller, upon presentation of the proper shipping and/or other documents to the foreign trade bank of its own country, receives immediate payment from the bank; prior authorization from the buyer is not required.

One problem for both the General Conditions and the Uniform Laws is the maintenance of a uniform interpretation of their terms in the countries where they are applied. Thus far COMECON, unlike, for example, the Common Market with its multinational Court of Justice, has not succeeded in establishing a multinational judicial or arbitration tribunal. Interpretation of the General Conditions is done only within each COMECON country by the national foreign trade arbitration tribunal, since the jurisdiction of judicial courts is excluded by the General Condi-

tions. In the past these national arbitration tribunals have reached different results on significant issues and there is no effective means for resolving these differences. Conferences of the presidents of these arbitration tribunals are held periodically to recommend uniform interpretations; but they are often unable to agree upon a recommendation and a recommendation, even after adoption, is not binding on the arbitration tribunals. This problem of uniform interpretation also exists for the Uniform Laws, for which there is likewise no single tribunal for interpretation.

In sum, along with their differences, the General Conditions and the Uniform Laws have a number of characteristics in common. But again, there is one key feature of the General Conditions that distinguishes it from the Uniform Laws and from all other attempts at unifying international trade law. This one key feature, of course, is that only the General Conditions are a broad unification having the force of law in every country of a significant trading area.

THE WARSAW PACT: INSTITUTIONAL DYNAMICS WITHIN THE SOCIALIST COMMONWEALTH

*By Robin Remington**

Established in 1955 as a result of the Soviet effort to prevent West German rearmament through the Western European Union and to some extent as a counter to NATO's decision to develop tactical nuclear weapons, the Warsaw Treaty Organization, more commonly known as the Warsaw Pact, stands as a multilateral political-military organization and the only example of such a regional defense alliance within the Eastern bloc. It was heralded by Moscow as the "main center" for coordinating the foreign policy of Communist states in Europe.

The Warsaw Pact has grown more important since the mid-1960's due mainly to its campaign for a European Security Conference. The seriousness of the Pact's efforts towards the conference has added to the organization's stature not only as an instrument of Soviet policy in Europe but as a force in Europe in its own right. The sanctioning of bilateral and Pact-coordinated initiatives towards a common goal has clearly added to East European prestige. A successful European Security Conference could well change the security system of the Continent and with it the organizations that make up that system. In the 1970's then, more than ever, the Warsaw Pact must be taken into account.

Set up as a formally egalitarian military-political institution with prescribed rules regulating both its own operation and the relations of its member states to each other and to nonmembers, the Warsaw Pact con-

* Massachusetts Institute of Technology.

sists of eleven articles, most of which deal with relations among member states. Its key articles provide for the peaceful settlement of all disputes; consultation on all international issues affecting common interests; establishment of a joint command and a political consultative committee; consultation in the event of a member state being threatened with armed attack; and the promotion of economic and cultural intercourse within the Pact. All of these articles, as well as others in the treaty, are based on the principle of respect for the independence and sovereignty of member states and noninterference in their internal affairs. While this principle has not always been observed in practice, it remains a legal cornerstone of the Warsaw Treaty.

The Warsaw Pact is in accordance with the UN Charter and membership is open to all European states, irrespective of their social and political systems, provided they agree with the treaty's aims. Furthermore, its members agree not to join any coalitions or alliances or make any agreements in conflict with the Warsaw Pact. The treaty's continuation in force was made contingent upon the signing of an all-European collective security treaty, and thus, its duration depends on members and non-members alike.

The Warsaw Pact does not appear to have been intended as a means to hasten the military integration of Soviet and East European armed forces. Indeed, the Soviets may have had more real control over East European armed forces in the early days of the Warsaw Pact than they have today. Rather, its real importance was, and continues to be, political. Initially, it provided the Soviets with a propaganda counterpart to NATO and a bargaining card by which they could seek disbandment of the Western alliance.

In terms of in-system relations the Warsaw Pact has formalized Soviet influence among its Eastern bloc allies. It gave the Soviets in the mid-1950's the best of both worlds by keeping Stalinism in foreign policy intact, without calling it so, while domestically attacking Stalin. The treaty did not sacrifice East European equality, but despite professed loyalty to sovereignty and noninterference in internal affairs, foreign policy maneuvers of its East European members were restricted by the Pact's requirement that members not join conflicting alliances and by the fact that no withdrawal procedures were specified in the treaty.

In addition to its significant diplomatic and political importance for Moscow, however, the Warsaw Pact satisfied a number of interests of its smaller member states. In that it was generally directed against renewed German aggression, a common fear of all East European peoples and regimes, the Warsaw Treaty also met specific East European security requirements. To the Poles it offered further support for Warsaw's demand for recognition of the Oder-Neisse boundary. For the East Germans, it retained the option of withdrawing into a democratic united Germany with the West Germans should reunification become feasible. For all East European regimes, the general recognition of sovereignty, equality, and noninterference in internal affairs provided support for subsequent challenges to Soviet hegemony.

How has the Warsaw Pact responded to interalliance conflict? During the 1956 situation in Hungary, the rules were thrown out as the Soviets

unilaterally intervened in the internal affairs of another member state. In reality, the Soviet resort to military force was not, as often mistakenly thought, a result of Imre Nagy's declaring Hungarian neutrality, for Hungary did not resign from the Pact until after Soviet troops had already intervened once and were again moving toward Budapest.

Since 1956, there have been challenges to Soviet authority by almost every East European member of the Warsaw Pact. These challenges reflect both domestic change and foreign policy initiatives unacceptable to Moscow. The events of 1956 in both Poland and Hungary expanded the Warsaw Pact in several ways, one of which was Moscow's agreement to discuss the withdrawal of its troops with the consent of all Pact members. Albania's defiance to the Soviets also reflects the development of the Warsaw Treaty Organization. While Albania was subject to diplomatic-economic sanctions including exclusion from both Warsaw Pact and COMECON meetings, it was never actually expelled from the Pact. There were no Pact meetings held to discuss its absence, nor was the alliance turned against Albania. Somewhat later (in 1965) there were signs that Moscow tried to use the Pact's political consultative committee to attempt reconciliation with the Albanians, and even more significantly Albania's indignant refusal to talk was not attacked by Pact members. Finally, following the invasion of Czechoslovakia in 1968, Albania's formal withdrawal from the Warsaw Pact was virtually ignored.

A further example of challenge to the Soviets can be seen in Soviet-Romanian differences which date back to the mid-1950's. Bucharest's challenges include: the refusal to cooperate with Moscow's plans for perfecting the mechanisms of both COMECON and the Warsaw Pact; firm neutrality in the Sino-Soviet dispute, achieved by improving relations and implying that, if pushed too hard, Bucharest might join Tirana in a pro-Chinese Balkan axis; and distinct independent foreign policy initiatives such as recognition of West Germany in 1967 and maintaining relations with Israel after the Six-day War.

The invasion of Czechoslovakia represented a Soviet reaction to yet another challenge to Moscow, and it had a great impact on the institution of the Warsaw alliance. While the invasion was not a formal Warsaw Pact action, the Pact was deeply involved in the conflict between Dubcek's socialism and the more orthodox views of some Warsaw Treaty Organization members. Prior to the invasion itself, the Soviets used the Pact consistently to remind the Czechs of their obligations to the alliance. Following the intervention there were numerous Soviet and East European attempts to cite the Pact as an *ex post facto* justification of the action; however, this position cannot be found in any formal Warsaw Pact document. More importantly, the Brezhnev Doctrine, by which the Soviets sought to justify the allied socialist intervention in Czechoslovakia and more generally the right to intervene militarily when necessary in any socialist country where socialism is threatened, was not accepted by the Warsaw Pact, which in effect meant rejection of the concept of limited (class-determined) sovereignty among socialist states.

In practice, the Soviets have not pushed the Brezhnev Doctrine within the Pact, as the events in Poland in 1970 clearly demonstrate. In that situation, the Soviets rejected intervention in favor of an approach which

used economic aid as a propping device until the Gierek government stabilized itself. Other conflicts within the Pact are also evident such as the de facto exclusion of Albania from the alliance, Romania's boycott of Pact meetings and insistence that the alliance not be used as a forum to attack China, and East Germany's attempts to use the Pact as a means of keeping control over other members' initiatives toward West Germany (contrary to Soviet policy direction after 1969). Thus, conflict within the Warsaw Pact was not contained after the Czechoslovakian intervention, and yet the alliance has flourished and grown as evidenced by both the reorganization of its joint command and regular meetings of the political consultative committee.

In concluding I should restate that the Warsaw Treaty Organization is composed of a limited number of states, having a common ideological orientation as well as similar social, economic, and political systems. Despite this ideological symmetry, the Warsaw Pact is increasingly subject to conflicts of interest among its members. Pact members have not only retained their national identities but have resisted broad economic integration and have kept control of their national armed forces. Consequently, the Warsaw Pact has reacted differently to interbloc conflicts and the crucial question has become who resolves such conflicts—Moscow alone or a collectivity in which the Soviets have the loudest, but not the only say?

The Soviets obviously saw the Warsaw Pact of the mid-1950's as an ex post facto justification for their unilateral decisions and an alliance which they could easily discard. Today it has become more than a means of exercising Soviet policy in Eastern Europe; it has become a viable institution for the Soviets and East Europeans alike. East European maneuvering within the alliance, particularly by the Romanians, and efforts at sabotaging Soviet sponsored joint coordinated policy toward West Germany by the East Germans, both demonstrate the development and maturity of the organization. Against the background of the more sophisticated Eastern European manipulation of the alliance, and Soviet awareness of the Pact as a useful tool for exercising what is left of Soviet control over Eastern Europe and for forwarding Moscow's all-European policy, the Warsaw Pact can, in my opinion, be expected to reflect a more genuine balance of interests than the Soviets initially intended.

CHINESE CRITIQUE OF THE "SOCIALIST COMMONWEALTH": IMPLICATIONS FOR PROLETARIAN INTERNATIONALISM AND PEACEFUL COEXISTENCE

*By James C. Hsiung**

Being a China specialist in the midst of a panel of Soviet experts, I find myself as something of a marginal man. The theme of the meeting

* New York University.

and the concern of the panel is the future of intergovernmental systems within the socialist commonwealth. Unfortunately, I must take a more pessimistic view than those who have gone before me. My research has yielded little on the relationship between socialist international organizations and the People's Republic of China. It is evident that the PRC has not associated itself with these organizations.

To begin with the People's Republic of China has avoided the term socialist commonwealth (actually a Soviet phrase), preferring instead to refer to the socialist bloc or camp. However, rejection of the term socialist commonwealth does not mean the PRC rejects the principle of proletarian internationalism, to which it has given different meanings reflecting the changing course of Sino-Soviet relations. In connection with proletarian internationalism, we must consider the principle of peaceful coexistence, which is also changing. It is my position that the PRC's views on either doctrine cannot be properly understood unless both are studied in juxtaposition and in the general context of China's changing relations with the outside world.

Generally, from the Chinese standpoint, proletarian internationalism and peaceful coexistence are very much alike. The former adheres to full equality, respect for territorial integrity, independence, and sovereignty, and noninterference in internal affairs. The latter reflects mutual respect for territorial integrity and sovereignty, nonaggression, noninterference in internal affairs, peaceful coexistence, and most importantly equality and mutual benefit, which the Chinese emphasize to remind the Soviets that in return for their leadership they have internationalist obligations toward the other members of the bloc. Furthermore, their use of nonaggression connotes opposition to the interventionist policies of the Brezhnev Doctrine.

From 1949 to 1954, Chairman Mao Tse-Tung accepted Soviet superiority in the socialist camp as the People's Republic depended on Moscow for genuine friendly help. In 1954, however, the Chinese began to question Moscow's superiority and to modify their position within the socialist camp. Using the principle of peaceful coexistence as the tool, the PRC attacked the use of proletarian internationalism to legitimize Soviet supremacy. Mao declared in 1954 that peaceful coexistence must be observed in the relations of all countries, including those in the socialist bloc. He also pointed out that Sino-Soviet relations should be governed by equality, mutual benefit, and mutual respect for sovereignty and territorial integrity. Proletarian internationalism, as defined by the Soviet Union, came under increasing attack by the PRC as the 1950's progressed.

Simultaneous with this challenge was Peking's effort to open up to the Third World, an effort which typified Mao's three-camp view of the world as officially enunciated in 1957. Theoretically, Peking reasoned, substitution of peaceful coexistence for proletarian internationalism would have the effect of putting the Soviets on an equal footing with the other Third World states.

Starting in the mid-1950's, the People's Republic developed a policy

characterized by a dual application of proletarian internationalism. On the one hand, Peking emphasized the importance of proletarian internationalism in the socialist camp led by the Soviet Union. On the other, the PRC saw Sino-Soviet relations as being of a different nature (*i.e.*, under the principles of full equality and comradely mutual assistance). Proletarian internationalism was not applicable to those relations. In particular, the Chinese emphasized the concept of mutual assistance as constituting the cornerstone of proletarian internationalism. Carrying that idea even further, Mao stressed that the doctrine also carried with it a certain international socialist duty. This new approach was best seen in efforts by Peking in 1954 and again in 1958 to get Moscow behind the PRC's campaign against Taiwan.

The period of the early 1960's saw Sino-Soviet relations rapidly deteriorate. This deterioration continued and was drawn sharply into focus by the Soviet intervention in Czechoslovakia in 1968 and the Sino-Soviet border conflicts of 1969. The PRC virtually read the Soviets out of the socialist camp by declaring them to be socialist imperialists. Thus, in Peking's view, proletarian internationalism now meant a united international front consisting of all revolutionary forces against the Soviet revisionists and the U.S. imperialists. To the Chinese, the Brezhnev Doctrine was the greatest problem. They saw it as a direct violation of true proletarian internationalism. This attitude was best demonstrated on Lenin's birthday in 1970 when the PRC launched a fierce attack on the Brezhnev Doctrine. In addition to challenging the doctrine's assumptions about "limited sovereignty," "international dictatorship and the division of labor," and the "special interests of the Soviet Union as a major world power," the core concept of the socialist community was also challenged. To Peking the Soviet-interpreted socialist community was nothing more than a colonial empire under Moscow's control. International socialist organizations such as the Warsaw Treaty Organization and COMECON were seen as mere vehicles of continuing Soviet dominance. Peking, with observer status in both organizations, last attended Warsaw Pact meetings in 1961 and has refused since 1966 to even respond to any invitations from COMECON.

Within the past three years the Chinese have scaled down their hostility to the Soviets and have opened up a whole new relationship with the once feared United States. The thrust of this Chinese initiative has clearly been the extension of the concept of peaceful coexistence to the United States. Furthermore, this extension means that the PRC not only accepts peaceful coexistence within the Third World but considers that this concept should also govern relations between the socialist and imperialist camps. While denunciations of the Soviet Union have continued, they have been greatly toned down.

At the same time, there has been recent reference to the PRC's willingness to observe its own international socialist duties to further peoples' revolutions in the oppressed world. The Chinese have talked increasingly about the strengthening of solidarity among the socialist countries, presumably including the Soviet Union. This is significant in view

of Peking's earlier exclusions of Moscow from the socialist camp altogether. It shows that the People's Republic may now feel secure enough to want to mend fences with Moscow. It is difficult to assess what form this reconciliation would take. Peaceful coexistence with its stress on mutuality and nonaggression would certainly be a part of it, and this would pose a direct conflict with such Soviet policies as the Brezhnev Doctrine. The restoration, then, of proletarian internationalism would depend on the Soviet Union's backing down from that doctrine and fulfilling its international socialist duties toward China—all in return for the PRC's friendship and support for Soviet leadership in the socialist camp.

So, relationships have changed, and there appears to be some hope that the open hostility of previous periods is ending. While the Chinese see no future in the socialist commonwealth, since they do not feel it exists in the first place, they may well see a brightening future for socialist solidarity and an expanded concept of peaceful coexistence.

COMMENTS BY VICTOR H. LI*

First, we have seen how the socialist countries have operated historically as an economic and political unity. Second, the introduction of the People's Republic as an active participant in the socialist commonwealth has done much to create change within the alliance. This latter point will be the focus of my remarks since it certainly has important implications for the first point and bears directly on relations in general among the socialist states.

It seems obvious that there are problems of both methodology and interpretation in these socialist relationships. Mr. Hoya, for instance, discussed the detailed legal regime of trade within COMECON. Implicit in his remarks, I think, was the popular concept that more rules will make organizations work better. The People's Republic, however, does not participate in COMECON. Rather, their commercial relationships with their socialist allies center around a few bilateral treaties. Generally, the PRC has no set law dealing with foreign trade. Chinese contracts are usually very short, but they can also be long and detailed such as the recent Boeing contract for commercial jet aircraft. Thus, the theory that more rules will make organizations more effective does not seem to hold in the case of the PRC. Furthermore, the Chinese model may be better than those developed by such traditional socialist institutions of the Warsaw Pact and the CMEA; it may be better not only for matters of trade but for broader matters of politics, as well.

Another key issue that has emerged from today's discussion is the concept of change within the socialist community and the temporal perspective that it represents. Far more material changes, for instance, have occurred in the governmental structure and policy of the PRC than anywhere else in the socialist world. The question that must be asked

* Stanford Law School.

is whether these changes reflect international policy shifts or whether Peking has merely been caught up in the cycle of change. Regardless of the nature of these changes, we in the West have fared badly in predicting these shifts, and one must wonder whether we have a methodological or conceptual problem here. Sino-Soviet relations have been very poor and continue to be bad despite some signs of improvement. We seem to be quite deficient in analyzing this relationship. How do we know there might not be another radical shift in Sino-Soviet relations?

With respect to the concept of sovereignty, I think it is clear that the Peoples' Republic accepts and advocates the concept in its most strict, absolute sense. Having achieved its place as a world power, the PRC does not seem as interested in asserting the equality principle as before; so perhaps, it will change within the socialist community.

The discussion was opened to the floor for comments and questions.

Asked to elaborate on her reference to Moscow's attitude towards the events in Poland in December 1970, Ms. REMINGTON replied that these events were the first test of the Brezhnev Doctrine after Czechoslovakia. The Soviets could have let the situation there deteriorate and then intervened under the pretense that socialism was threatened. Or Moscow could pump in substantial amounts of economic aid until the Gierck government stabilized the situation. The Soviets, she explained, wisely chose the latter course showing, in effect, an economic extension of the Brezhnev Doctrine, *i.e.*, that it could work without resorting to intervention as a vehicle for enforcing it.

Mr. Hsiung was asked to clarify the broad distinction he drew between proletarian internationalism and peaceful coexistence, particularly since the former concept really applies only to the socialist world while the latter concept is usually defined in terms of capitalist and socialist states. Mr. HSIUNG observed that Peking did not share the Soviet two-camp view on peaceful coexistence and we must view these differences in a temporal way. He repeated that in 1954-1956 Peking felt the concept of peaceful coexistence applied to all countries, but the PRC's Third World view began to change and by 1957 peaceful coexistence applied both within the Third World and between that Third World and the socialist bloc. Mr. HSIUNG also pointed out that peaceful coexistence was in practice even extended to the imperialist world by the Chinese.

Asked to comment on the view that the Soviets see bilateral treaties within the socialist commonwealth as a means of achieving a binding contract between two intergovernmental entities, Mr. GINSBURGS pointed out that, under the old system, after socialist states signed bilaterals the state enterprises then entered into the contract. Under the new system agreements on coproduction go first to state agencies and to government subagencies to be carried out. This raises the question of joint responsibilities. State agencies, as private juridical persons enforcing their obligations, must reconcile these problems. He further explained that the civil law aspect caused no problems since the arbitral system will work.

Ms. Remington was questioned on her comment that the Warsaw Pact had sought to block West German entry into the Western European Union. Had Soviet influence accomplished this? In response, Ms. REMINGTON pointed out that West Germany was still a problem for the Soviets. Initially Moscow had been worried about West Germany's entry into NATO and ratification of the Paris Agreements. The Warsaw Pact developed partially as a response to this West German remilitarization.

Asked to elaborate on the core of the Sino-Soviet conflict, Mr. Li responded that the ideological affinity was there but strategic political considerations were an important part of the question. He felt the key point related to the changing PRC leadership. Much will depend on whether Mao or Chou dies first and on what sort of gap there is between their deaths. He predicted that a real fight for leadership between the anti-Soviet and pro-Soviet sides would occur if Chou were to die first.

Mr. HOYA responded to Mr. Li's questioning of the value of COMECON's detailed legal code. Mr. HOYA pointed out that the role of foreign trade in the PRC's national economy has been small, whereas in the national economies of the East European countries foreign trade has been significant. Therefore the East European countries have had much more reason to develop the most effective means of conducting foreign trade. He concluded that consequently the COMECON experience is probably a more reliable indicator of the value to socialist countries of a detailed legal code for foreign trade. With respect to East-West trade, Mr. HOYA observed that American companies have frequently found that their contracts in trade with East European countries run longer than contracts for comparable deals with West European countries. In this connection it has been reported that the contract drafted for the PRC's purchase of jets from Boeing was exceedingly long. Hence he thought that the PRC, as it expands its foreign trade and especially its East-West trade, may come to value detailed legal documents more highly than it has in the past.

Mr. Ginsburgs was asked to clarify the impact of sub-state units in the 20-year perspective plan. Are they under the larger state-wide units or under those same state-wide units within regional boundaries? Mr. GINSBURGS noted that the program is problematic and that new forms and styles will be worked out. It was possible to have these sub-state units interact across borders. Joint stock corporations were, for example, making a comeback, as evidenced by the joint USSR/Mongolia corporation to exploit minerals in Mongolia. Another example is the project for joint reconstruction of industrial plants in the USSR and East Germany, which will lead to eventual coproduction arrangements. As further evidence of new forms of cooperation and the general notion of spreading cooperation of government units beyond borders, he mentioned the extension of power and electrical grids within Eastern Europe. The East Europeans have been better at this form of inter-governmental cooperation than have the Soviets, who tend to be very reluctant to break down centralized state authority.

Asked why he had referred to the private law entity since this is a term alien to state corporations and socialist entities, Mr. GINSBURGS explained that the Soviets see the state as absolute and right, but the state sub-units do not have this characteristic and thus can be referred to as private law entities for our purposes.

Mr. LIPSON then asked for closing remarks by the participants.

Mr. HOYA expected the COMECON General Conditions to develop in two ways: (1) they will probably be expanded to include an overall provision on damages; and (2) they will probably be modified to permit contracting parties to depart more easily from various provisions, so that the parties will have more freedom in drafting their individual agreements. Both of these changes will make the General Conditions more like legal codes used in the West. Mr. HOYA also suggested that the General Conditions, although the product of centrally planned economies, are becoming increasingly worthy of examination in the West. With each passing year, Western market economy governments are interposing themselves ever more forcefully into the operations of foreign trade. As one small example, in the U.S.-Soviet Trade Agreement drafted in October 1972 the U.S. Government, together with the Soviet Government, encourages contracting parties in this trade to use a particular kind of arbitration clause in their contracts. In the past the U.S. Government has not normally concerned itself with such details of how private American parties draft their foreign trade contracts.

Ms. REMINGTON felt that there may not be a socialist commonwealth to which we can refer but that the socialist states have matured and have clearly developed the concept of resolving conflicts of interest alongside that of right action. She added that the changing question is rather how unanimous must right action be; this will be the real focus of the future disputes among the socialist allies.

Mr. HSIUNG did not see a return to a bipolar situation but rather the emergence of a multilateral balance. As a result, he felt that the PRC had eased the tension in its relations with both the USSR and Japan. With respect to the Sino-Soviet dispute, despite the Khrushchev-Mao conflict of the late 1950's and early 1960's, a real dialogue was going on behind the scenes. Mr. HSIUNG felt that Mao had put real pressure on the Soviets during that period so as to force Khrushchev into backing the PRC over a Taiwan showdown with the United States. The result was Khrushchev's call for peaceful competition with the West, while Mao declared that peaceful coexistence did not condone Soviet capitulation to the imperialists.

Mr. LIPSON drew attention to the growing length of contracts with the socialist states. He noted that Soviet negotiators arrive well prepared and with instructions from the hierarchy back in Moscow. These negotiators, he added, do not have the authority to delete anything from their draft contract, but they can add clauses which take away some of the impact of their draft provisions. This obviously creates pressure in the direction of lengthy contracts.

JAY A. BURGESS
Reporter

RECOVERING CONFISCATED ASSETS AND CAPTURING SANCTIONED GOODS: EXTANT AND PROSPECTIVE REMEDIES

The roundtable convened at 8:30 p.m., August 12, 1973, Seymour J. Rubin presiding.*

REMARKS BY THE CHAIRMAN

The topic for this roundtable is broad enough, and perhaps disparate enough, to raise some procedural difficulties. Fortunately for the moderator, these are nonetheless easier to handle than the substantive issues.

The thread which connects a discussion of the recovery of confiscated goods with one of capturing sanctioned goods is, as the title of the roundtable suggests, that of remedies, and, more specifically, remedies *in rem*. Under applicable law, international or national, what action may be taken against property which is asserted either to have been unlawfully taken or to be unlawfully in commerce? To what extent may, or should, national courts pass upon the difficult substantive issues involved in the assertion of illegality in either situation?

There is a long history of asserted confiscations and of attempts to assert remedies against such acts. What is applicable international law has on numerous occasions been hotly disputed. The U.S. view, stated in connection with the Mexican oil and agrarian expropriations, was contradicted by the Mexican Government, which argued that there is in international law no rule "accepted in theory nor carried out in practice, which makes obligatory the payment of immediate compensation nor even of deferred compensation, for expropriations of a general and impersonal character." Cases have arisen in which the takings were neither general nor impersonal; and the effect of these is differently viewed by the nations of the world. Equally to the point are the procedural issues: the questions of sovereign immunity, of "act of state," of comity, which have often been interposed against those who assert a right against what they consider to be their rightful property, or its proceeds. The issues of both substantive law and of appropriate remedies are dramatically raised by the actions taken in recent years by the Allende Government in Chile and by the remedies sought by the affected foreign interests. Long though the discussion has been, current developments raise issues which are both fresh and important.

Even more novel are the questions of remedies raised by the UN resolutions directed against Rhodesian exports, by domestic legislation in the United States argued to override the UN sanctions, and by the recent case of *Diggs v. Schultz*. Somewhat similar problems might have arisen in connection with the blacklisting of certain business enterprises located in neutral countries during World War II and, indeed, the pursuit by the Allies of enemy assets in Switzerland, Sweden, Portugal, and Spain may bring some analogies to mind. But there has been less experi-

* Washington College of Law, The American University.

ence with this sort of issue, and the possibilities of enforcement of UN sanctions, either by actions *in rem.* or by use of collateral remedies (again the wartime blacklisting seems possibly relevant) promises us an interesting and fruitful discussion.

REMARKS BY ROBERT MACCRATE*

The remedies for the recovery of confiscated goods outside of the confiscating state have been neither as fully utilized nor as fully developed as precedent, principle, and usefulness would seem to warrant. The possibility of recovering confiscated goods abroad after they have left the confiscating state is not, of course, a universally available response to the expropriation of an alien's property. But it is available in many situations where the international movement of goods is involved and frequently affords the only means by which the victim of a confiscation can get a determination of rights under principles of international law and prevailing notions of public order.

Such municipal remedies are not a substitute either for individual agreements for arbitration or for international agreements which provide global settlements and establish claims procedures. However, where the confiscated goods move in international commerce, a carefully planned program of actions to recover cargoes of the confiscated goods or their proceeds can not only provide a judicial adjudication of the basic wrong and partial recompense for the property taken, but also promote a willingness on the part of the confiscating state to reach an agreement to indemnify for the property or at least to submit the matter to an international tribunal.

Much of the discussion of this topic in this country during the last decade has featured debates over the *Sabbatino* case and the various scattered and somewhat dated precedents relied on in the *Sabbatino* opinions. However, recent developments have contributed significant additional data concerning current attitudes toward recovery of confiscated goods in various foreign courts. In recent years, oil, tobacco, sugar, and metal moving in international commerce have all provided opportunities for invoking the remedies for recovering confiscated goods.

In addition to the well-known events surrounding the termination of the Iranian oil concession agreement in 1951, the more recent Algerian expropriation of French interests, the Iraqi seizures of 1961 and 1972, and the takings by Libya of a British concession at the close of 1971 are all instances of oil expropriation where programs were developed by the victims of the expropriation for invoking judicial remedies to recover the product of their oil field operations.

Cargoes of tobacco from Indonesia provided the basis for litigation in Amsterdam and in Bremen during 1959 in which conflicting results were reached; but in both jurisdictions the particular cases appear to have been decided on a basis of whether the forum's public order in

* Of the New York Bar.

the particular circumstances would invalidate the effect of Indonesian seizures of crop lands owned by Dutch citizens.

Sugar cargoes from expropriated plantations in Cuba were, of course, the basis for the *Sabbatino* litigation in the U.S. courts. The 1964 Hickenlooper Amendment was expressly directed to preserving the private remedy to recover specific expropriated property regardless of judicial self-denial in applying the act of state doctrine, and the *Farr* case confirmed its effectiveness to accomplish this result.

These precedents in oil, tobacco, and sugar provide the background against which to consider the current program of litigation developed by Kennecott Copper Corporation in response to the 1971 confiscation of its mining properties in Chile. Thus far, proceedings to recover confiscated copper have been prosecuted by Braden Copper Company (the Kennecott subsidiary involved) in France, the Netherlands, Sweden, Germany, and Italy. These actions were begun by Braden only after it had first exhausted all available remedies in Chile.

Braden's case is a strong one: only five years after voluntarily entering into a carefully developed and guaranteed arrangement of joint venture with Chilean state authorities and making extensive new investments, its property has been taken without a penny of compensation.

Braden, originally known as The Rancagua Mines Co., was organized as a corporation under the laws of the State of Maine in 1904 and acquired ownership of its basic property, the El Teniente mine, in 1905. The El Teniente mine and related facilities were owned and operated continuously by Braden from 1906 to 1966. Commencing in 1964, an agreement was entered into with the Chilean state for the expansion of the capacity of the El Teniente mine and related facilities from 180,000 tons per year to 280,000 tons per year. Rather than continue the established pattern of purely private ownership with Chilean participation through a very complex set of taxes and surtaxes ranging as high as 87% of income, the parties agreed to a plan of joint public-private ownership. Under this plan, a new mixed corporation, Sociedad Minera El Teniente S.A., was organized in 1966 and in 1967 Braden transferred all of its El Teniente mine assets, including the mineral deposits and all the related facilities, to the new company in exchange for its shares. Thereafter, to launch the joint public-private venture, Braden sold 51% of the El Teniente company shares to the Chilean Copper Corporation, known as Codelco, a Chilean government agency, for \$80 million dollars, but in order to provide adequate financing for the planned expansion Braden lent the \$80 million to the El Teniente company. As a result, after the formation of the new El Teniente mixed company, Braden was both a 49% shareholder and a substantial creditor of the company. This was the situation in July 1971 at the time of the total nationalization of the El Teniente mine under the Chilean constitutional amendment enacted at that time.

Pursuant to the Chilean nationalization law, the business and property of El Teniente were subjected to the control of an administrative commission, until a new El Teniente corporation was established by decree

in July 1972 with 95% of its shares owned by Codelco and 5% by another agency of the Chilean State. Meanwhile, Codelco has served as the selling agency for the El Teniente copper.

Under the 1971 Chilean law, no compensation was to be paid for the mineral property of any nationalized mining company. The law further provided that any compensation to be paid for other assets was to be determined only after a series of deductions were made. Among these was a discretionary sum to be fixed by the President of Chile as so-called "excess profits" earned between May 1955 and December 1970 by any company nationalized or by its predecessor company. Under this provision, in September 1971 the President of Chile fixed a deduction of \$410 million to be made from any compensation to be paid for the El Teniente company's assets. This sum of so-called excess profits exceeded all profits earned by Braden from 1955 to 1970 and indeed wiped out all profits back to 1938, a 32-year period.

Taking the "excess profits" deduction as fixed by the Chilean President, the Comptroller General of Chile determined a negative compensation balance for El Teniente of more than \$310 million. Braden took an appeal from the Comptroller General's decision to the "Special Copper Tribunal" created by the 1971 nationalization law. Braden challenged the various deductions made by the Comptroller in his determination, but since the \$410 million deduction ordered by the President for so-called "excess profits" totally destroyed the possibility of any compensation being paid to Braden, it asked that the Tribunal first rule as to whether it had jurisdiction to review the President's action. In August 1972 the Special Copper Tribunal held it was without jurisdiction to review the President's decree of "excess profits" and in a further decision in September 1972 stated that the President's action was not subject to review by any other Court in Chile.

Having thus exhausted all available remedies within Chile to obtain compensation for the expropriation of its property, Kennecott and Braden immediately gave notice of their rights of ownership to all those concerned with the acquisition or disposition of copper and other products from the El Teniente mine. They also announced that they would take all such action as might be necessary to protect those rights with respect to the metals or their proceeds.

Braden's first application outside of Chile was made to the Tribunal de Grande Instance of Paris, France. Braden asserted that, upon the nationalization of the El Teniente mixed company and its dissolution without indemnity, Braden had become the "undivided owner" of the El Teniente mine and its products and specifically that copper sold to two French purchasers by Codelco had been Braden's property for which Codelco was indebted to it. On September 30, 1972, the Paris Court entered an order enjoining the two French purchasers from paying for the shipments of El Teniente copper then aboard the West German ship, *Birthe Oldendorff*, which was on the high seas destined for Le Havre. When notice was given of the injunction against payment, the longshoremen in Le Havre stated that they would not unload the cargo. The *Birthe Oldendorff* was there-

upon diverted from Le Havre to Rotterdam, where a Dutch assignee of Braden obtained an order from the Rotterdam District Court to seize the cargo and to arrest the ship. When the longshoremen in Rotterdam at the request of the International Transport Workers Federation also refused to unload the copper, the Dutch Court enjoined their interference with the unloading of the vessel. However, when it was established through access at that point to the ship's papers that there was no copper aboard the *Birthe Oldendorff* other than that already subject to the jurisdiction of the Paris Court under the earlier orders, the petition to the Dutch Court was withdrawn to allow the vessel to return to Le Havre where the vessel was then unloaded.

Before the French Court, Codelco urged that as an agency acting for the account of the Chilean state it was immune from jurisdiction and its assets from execution. (The ship's manifest, however, uncovered in the Dutch proceedings, showed that Codelco was acting for El Teniente and not for the Chilean state.) Codelco further argued that the expropriation was valid and not subject to review by a French court and that Braden accordingly had no right to the copper or to the proceeds of the sales to the French purchasers. Following oral and written submissions to the Court, a decision was rendered rejecting Codelco's plea of sovereign immunity and appointing a referee to investigate and

(1) to determine the utilization of funds received by Codelco from its commercial activities as bearing upon their amenability to execution;

(2) to appraise the conflicting contentions of the parties as to whether there was an equitable indemnity of Braden for the taking of its property; and

(3) to gather all elements that could permit a global settlement of the dispute between Braden and the Chilean authorities with respect to the expropriation.

Pending the further proceedings the garnishments of the payments of purchase price were cancelled, but only on the express condition that Codelco would hold the sums and produce them in the event it was adjudged liable to Braden.

In the course of this very significant decision of November 29, 1972, the Paris Court expressly reaffirmed that no legal effect is given in France to an expropriation by a foreign state without an equitable indemnity and that, in light of this, the Court acknowledged in principle that a valid claim existed in favor of Braden while awaiting the results of the investigation by the referee.

While the initial proceedings commenced by Braden were in progress in France, a shipment of El Teniente copper destined for a Swedish purchaser was landed in Stockholm on November 8, 1972. Both Braden and Codelco claimed to be the owner of the copper. The Swedish purchaser deposited a sum equal to the purchase price with the Provincial Council of Stockholm. Under the applicable Swedish statute, before Braden or Codelco can collect the money a Swedish court must determine who is entitled to it.

The first procedural steps by Braden in Germany were taken in

December 1972 with an application in the Guardianship Court in Hamburg to have a guardian or curator appointed to represent the "split company" that under German law exists in Germany for property which is found there after the existence of the El Teniente company in Chile was terminated by the nationalization. By order of December 12, 1972 the Hamburg Court appointed a curator for the "split company" with authority to enforce any claims based on the mining and sale of copper from the El Teniente mine in Chile.

The curator of the El Teniente split company thereafter, in anticipation of the arrival in Hamburg of the Russian vessel *Harry Pollit* from Chile and in order to lay a foundation for a main action in Germany, applied to the Superior Court of Hamburg for a mandatory injunction order directed to a German refinery to turn over to the Court Bailiff any copper derived from the El Teniente mine it received from the *Harry Pollit*. The Court granted the injunction on January 5, 1973 and the Court Bailiff was alerted to arrange for storage facilities and to await the arrival of the vessel. Some concern was expressed that the cargo might be offloaded in route, but a harbor watch confirmed that the copper bars and slabs were being unloaded on the lighters on January 5 and transported to the refinery in the Hamburg area. The German refinery, when presented with the Court's order, entered into an agreement pursuant to which the copper was not sequestered but stored in trust by the refinery subject to the further order of the Hamburg Court.

On the basis of the disclosures obtained in the special injunction proceedings, Braden confirmed the presence and extent of the El Teniente copper entering Germany on the *Harry Pollit* and based upon this information was able to initiate through the curator a principal proceeding begun on January 16, 1973 in which the basic issues could be fully adjudicated. In the special proceedings relating to the injunction which had restrained the refiner from processing the copper, a hearing was held on January 18 and the Court lifted the injunction on the basis of the jurisdictional principle that no sufficient connection with West German parties had to that time been demonstrated; but the principal proceedings on the merits are continuing and in them Braden, through the curator for the El Teniente "split company," is attempting to remedy any lack of proof and is asserting its continuing interest in the copper from the El Teniente mine and the illegality of the expropriation without compensation.

The Hamburg Court in its decision on the injunction expressly confirmed that an expropriation will not be recognized in the Federal Republic of Germany if the recognition would violate basic principles of German public policy. The Court stated that in its opinion a full consideration could lead to finding a violation of public policy and further noted that for evaluating the problem the events leading up to the expropriation should be considered as a whole, that the expropriation was effected for all practical purposes without indemnification and under discriminatory conditions, and that other legal channels had been closed

to the parties concerned. The Court after a further recital of the facts of the expropriation concluded:

this conglomeration of acts of violation appears so serious as to be entirely unbearable under our view of legality and morality.

During February 1973 Braden entered the Italian Courts. Having confirmed the arrival of El Teniente copper in Italy and its receipt by three Italian purchasers, Braden sought no preliminary remedy. The summons and complaint in three separate actions were filed in Milan, Rome, and Brescia, against the three Italian purchasers of El Teniente copper. Each complaint asked for delivery to Braden of copper recently received by the defendant or payment of its value and for damages to be assessed in a separate proceeding.

Thus far, Kennecott and Braden have instituted court proceedings in five separate countries to enforce their remedies for the recovery of their confiscated property or its proceeds. In the course of the French proceedings, at the request of the Court, Kennecott and Braden offered to submit the entire dispute to the International Centre for Settlement of Investment Disputes for arbitration, but Chile to this time has refused. Nonetheless, the French Court's interest in an overall disposition of the dispute remains and it has expressly directed the referee "to gather all elements that could permit the global settlement of the dispute by the opposing parties."

Until arbitration can be invoked and its awards enforced, the various separate actions to recover specific property permit the submission of the dispute to judicial settlement piece by piece and offer the hope ultimately of a more comprehensive disposition of the Kennecott-Braden claim.

Objections have been raised that the courts of other countries should not be involved in a Chilean domestic question which pertains to natural resources within Chile. But this objection ignores the fact that goods which move in the stream of international commerce are not a purely domestic concern of any one state. The multinational marketplace is what gives economic value to such goods and the natural resources from which they are derived. Oil and ore in the ground, or tobacco and sugar growing in the fields, come to have value because there has been investment to permit their being brought into established channels of trade.

International law and public policy of individual foreign states naturally concern themselves with the origins of such goods when they are moving in world commerce. This concern is not only with the goods but with the investments which brought the goods into being. If foreign investments which brought the goods into being. If foreign investments are confiscated without a remedy being provided, further foreign investment in developing countries will not be forthcoming. Only if each nation participating in the international flow of trade opens its courts or other comparable forums to provide binding settlement of disputes

relating to the origin of goods in commerce which embody such investment can there ever be developed a system of law adequate to the conditions of modern trade and commerce.

REMARKS BY ROBERT K. GOLDMAN *

Since Mr. MacCrate has traced the events in Chile which have lead Braden to institute legal proceedings in Europe to recover its allegedly confiscated copper and their proceeds, I think it important to state the legal theory upon which the company is basing its actions. Braden is asserting ownership rights in copper and other products derived from El Teniente mine on the ground that the constitutionally mandated procedures for valuating El Teniente's assets, as applied, fell below the minimum standards required by international law and thereby resulted in the confiscation of Braden's equity position in El Teniente. Accordingly, the Company argues that any rights acquired by Chile by virtue of the nationalization are without legal effect.

As Mr. MacCrate noted, the French Court rejected the Chilean Copper Corporation's contentions and recognized in principle that a valid claim exists in favor of Braden under applicable French law. Braden's choice of a French forum to litigate its substantive claim is hardly surprising. It is suing in a jurisdiction which applies the restrictive theory of sovereign and sovereign immunity, permits execution against the commercial assets of its instrumentalities, does not have a judicially-fashioned counterpart to the U.S. act of state doctrine, and requires, as a matter of public policy, that equitable compensation must accompany a legally valid expropriation.

It appears, therefore, that a merits determination of Braden's claim is a real possibility. This is, of course, exactly the result Braden sought through its third-party attachments. Certainly, the company from its perspective has nothing to lose and everything to gain regardless of the outcome of the litigation; it is doubtful that the French court could leave Braden in a position worse than the Special Copper Tribunal left it by virtue of its decision. If Braden does get its day in court, what will the scope of the court's inquiry be in reaching a global settlement of the dispute? The novel and problematic issue of excess profits deductions, which the Copper Tribunal determined it lacked jurisdiction to hear, will be squarely before the court. Will the court permit relitigation of all claims Braden raised and was heard on the merits before the Copper Tribunal, or will it only hear the claims relating to excess profits? How the court resolves this particular issue will be most interesting in view of the parties' conflicting claims.

The possibility of this litigation also raises basic policy questions concerning the proper role of domestic courts in the international legal order. Perhaps the foremost question is whether the French court should even pass on Braden's substantive claim in view of the lack of global

* Washington College of Law, The American University

consensus on what international law requires in expropriatory situations and, if the court does so, what sources or standard of international law will it find applicable or controlling?

If one assumes, as Professor Lillich and other scholars do, that domestic courts are unofficial agents of the international legal order and through their decisions help clarify and develop principles of international law, then the French court should surely hear Braden's claims. However, should the court not adjudicate on the ground that state practice concerning the payment of compensation is so diverse as to indicate a lack of an internationally accepted standard, then arguably the court will help perpetuate this lack of consensus and abdicate its role in making and applying international law. If the court hears the case, hopefully, it will undertake an *impartial* and *thorough* examination of contemporary valuation practices as an aid to its determination of what standard it will apply. By so doing, the French court could help fashion an acceptable minimum standard for the valuation of nationalized property in international law.

The possibility exists, and it is, unfortunately, a very real possibility, that the court will regard its own public policy as controlling and declaratory of a general norm of international law and thereby apply a compensation standard divorced from the realities of contemporary international practice. Such a result would command little respect outside of France and would be counterproductive to the search to fashion an acceptable standard.

Braden's present course of action is by no means free of risk and ultimately may backfire on the company. I do not agree with Mr. MacCrate that a concerted plan of transnational litigation will force Chile to negotiate a settlement or to submit the dispute to an international tribunal. The law suits may have jeopardized, if not precluded, the possibility of such action.

It is noteworthy that all of Chile's major political parties have supported President Allende in his condemnation of Braden's actions. The Unidad Popular has characterized the French suit as economic aggression and an attempt to establish an economic boycott of Chile, while the Christian Democratic party described the move as "an affront and an open robbery attempt." Moreover, the atmosphere created by these suits can hardly aid the progress of bilateral discussions presently underway between Chile and the United States.

Chile, of course, could undertake various actions to protect its copper in the free flow of international commerce. Depending on the outcome of the French litigation, Chile and the other copper exporting nations which comprise CIPEC might decide to review the overall situation and take appropriate measures against nations who open their courts to Braden in similar proceedings. In order to avoid future litigation abroad, Chile could, for example, sell all disputed copper only through letters of credit drawn by Swiss banks, thereby transferring all risk of loss to foreign purchasers. Under these circumstances, French courts might take a different attitude toward Braden's claim if the defendants

were French citizens rather than agencies or instrumentalities of the Chilean Government.

It is interesting to speculate about the likelihood that Braden will pursue its remedies in the courts of the United States. The prospect is intriguing and certainly raises far more complex and profound questions about the role of domestic courts in the international legal order than the present litigation in Europe. Undoubtedly, the possibility of such action is eagerly awaited by all Sabbatino watchers and those who wonder if the Legal Adviser will get back into the letter writing business.

Given the ambulatory character of the act of state doctrine after the *First National City Bank* case, one cannot predict with assurance the outcome of such a case. Much would depend, of course, on whether the suit would arise under the Sabbatino Amendment or the *City Bank* case itself. In either event, however, it is clear that the State Department will make the initial and binding determination whether or not the court should be relieved of the restraints imposed on it by the act of state doctrine. I share Professor Lowenfeld's view that so long as the authority and independence of the court to adjudicate international law issues depend on the political decisions of the State Department, then the court in so adjudicating can only accentuate the political character of the issue and diminish the moral character of its judgment.

Under the circumstances, it would not be surprising if Braden, or another company in a similar situation, were the big loser in such litigation. Braden cannot be assured of a successful merits determination of its claim and the Department of State, by the mere act of authorizing adjudication, could possibly preclude its assistance to the company in future attempts to settle the dispute.

Mr. MacCrate is correct in stating that existing remedies in the area of claims disputes are inadequate under international law. This merely reflects the lack of agreement in the world about what international law does or does not require in property takings affecting the interests of aliens. The conflicting claims of the Chilean Government and Braden bring this problem into sharp focus. As such, they merit the close attention and consideration of students and practitioners of international law.

REMARKS BY ROLAND BROWN *

I would like to center my remarks on the question of how the issue of sanctions should be dealt with in the Rhodesian case.

Rhodesia is a situation of outstanding importance. First, the rebel government of Salisbury is not recognized anywhere in the world in either a *de jure* or a *de facto* sense. Secondly, the British Government claims sovereignty over Rhodesia; therefore, constitutionally, the British Parliament can legislate for Rhodesia. Thirdly, the United Nations has passed mandatory sanctions against Rhodesia. These three separate ele-

* Barrister-at-Law of Gray's Inn, former Attorney General of the United Republic of Tanzania.

ments constitute a basis of action but the success of that action depends upon the initiative taken by the British Government.

Britain may say that the title to sanctioned goods vests in the Crown. English law would then take effect before those goods left the country; therefore its claim would not be extraterritorial. If the phrase "immediately before" were used by the British legislature, its actions would not be open to contention. Then, the British Government has title to the goods and could take action to recover them before municipal courts of other countries similar to the action taken in the *Rose Marie* case and by Kennecott.

The British Government need not bother about the question of international principles of public law. That law would have no application where the British Government had title, where the goods were exported contrary to UN sanctions, and where the British Government stated that it was making an effort to enforce those sanctions before municipal courts. The British Government is unlikely to take such an initiative, although it is part of the ongoing discussion of British sanctions and how those sanctions can be made more effective.

How would the British Government fare before other municipal courts? There is no simple answer since the question presents a multiple conflict of laws problem. How might Britain fare in American courts? How would the Byrd Amendment affect the issue? I am not familiar with that amendment, but I am familiar with English law. Suppose that some part of the United States was in rebellion against the federal government, and the United Nations imposed sanctions against goods from that area. Would the United States retain title to the goods exported by the rebels? How would the United States fare as a plaintiff in the courts of the United Kingdom? It would find itself on strong ground. Those courts would deem the transfer of title to have occurred while the goods were still within U.S. jurisdiction.

There are two difficulties. First, it might be objected that the legislature was acting in a penal capacity and therefore other courts would not enforce a penal statute. But I doubt that this legislation can be properly characterized as penal. It depends upon the form of the assertion. It depends upon the form which is employed. Looking at the background of the Rhodesian situation, if legislation were along this line, it would prove prudent for the British Government not to acquire beneficial title but for it to hold that title for the lawful government organ of Rhodesia for proper disbursement at the appropriate time. Then the legislation is not penal but remedial. Dicey indicates that the courts will not enforce penal statutes; a further rule in the English courts is that those courts will not enforce public laws of another state where the foreign sovereign of that state so insists. Yet there is a procedural difference between Dicey and the other texts and the present situation in Rhodesia. There is only one 17th century case which is authoritative, *Don Alonzo and Ponello*, and that authority takes up only ten lines of print. The Spanish Ambassador sought to recover tobacco in England through the English Court of Admiralty on the grounds that those goods had been confiscated

by Spain. The Admiralty Court refused, basing its decision on an issue of jurisprudence. That English decision is relevant in giving an idea of the sort of issues raised by these kinds of problems. I myself choose not to state an opinion except to venture that, if Britain could not pursue an *in rem* action against goods where there is a UN sanction, basic beliefs in the efficacy of law would be shaken.

The CHAIRMAN mentioned a relevant U.S. case developing out of World War II. In 1941 a remedy on behalf of the Netherlands Government-in-Exile was given efficacy by a New York court in a roughly similar situation.

REMARKS BY BERT LOCKWOOD *

I would like to address myself to international outlaws and what domestic procedures are available to arrest their activities. While at first glance the nexus between domestic justice and international justice may seem tenuous, I wonder: Is it surprising that the same administration that is so insensate over the deprivation of the human rights of blacks in Southern Rhodesia is the same administration that proclaimed early in its tenure that if you have seen one slum you have pretty much seen them all, and hasn't visited another since? Is it surprising that the same administration that evidences so little concern over the political rights of the majority in Rhodesia is the same administration that "bugs" and sabotages the political process within the United States?

The British within the past few weeks have come to recognize this subtle interplay. The detention without being charged, the secret trial, and the severe penalties against journalist Peter Niessenwand have been recognized as so profoundly contrary to any concept of British justice as to have rendered void what little support remained for the Smith regime. That same corrosion is eating away at the American sense of justice. *Diggs v. Schultz*: What are the facts? Who are the outlaws? What are the possible remedies?

The United States complied on the whole with the UN sanctions until the so-called Byrd Amendment was passed in November 1971. The amendment displays the high level of sophistication that can be garnered when lobbyists from a major U.S. corporation, in this instance Union Carbide, pool their resources with a Senator and Southern African lobbying interests. What did Byrd want to accomplish? He wanted to demonstrate tangible support for the Smith regime, yet he wanted to avoid a wholesale opening of trade, because Southern Rhodesia has huge stock-piles of tobacco, and any Senator from Virginia would be committing political suicide with such an act.

Someone came up with the ingenious idea of attaching the undermining of the embargo to something that sounded in the national security

* New York University Center for International Studies.

interest, *i.e.*, making it a rider to the Stock Piling Act.¹ Additionally, it was necessary to obscure this intention.

The Office of Foreign Assets Control issued a general license for 72 items including as of February, 1972, metallurgical chromite. The first shipments in February, 1972 were destined for use in stainless steel kitchenware. They entered the United States at a small port in Louisiana and were moved by scab labor (guarded by police dogs) after union labor refused to unload the shipment. Were the shipments necessary? We have huge excesses of chrome in our stockpile. Two bills were introduced by the Office of Emergency Preparedness to sell over one-third of our stockpile. Indeed, about two weeks ago the *New York Times* carried an article indicating that the President intended to sell substantial quantities from the stockpile in an effort to drive down soaring prices.

A number of plaintiffs, including the Congressional Black Caucus, a number of church groups, the American Committee on Africa, two Rhodesian refugee groups, a number of individuals from the Center for International Studies at New York University, and Gore Vidal, who brought a class action for authors whose books were banned in Southern Rhodesia, joined in an action against the U.S. Treasury Department, Union Carbide Corporation, and Foote Mineral Company, seeking injunctive relief striking down the general license and impounding the imported chrome, in the Federal District Court in Washington, D.C.

What are the issues? The first issue is what is the status of the United Nations Charter. Is it an extraordinary treaty? If so, then it does not come within the normal rules of the treatybreaking power. Plaintiffs have argued that it is an especial treaty, noting that other nations must obey UN sanctions even if they have no veto over them. Therefore, the United States must go to the United Nations and change the treaty or it must obey the treaty obligation. If the United Nations Charter is similar to other treaties, then Congress can violate that treaty. Senator Byrd intentionally obfuscated the issue. The Byrd Amendment creates a number of options which if they were pursued would be consistent with the United Nations treaty obligation. But even so, if Congress is authorized to violate the treaty, that treaty can be violated only by clear and express action—not by so casual a procedure as followed by Byrd. If Congress gives the President a number of options, he must

¹Strategic and Critical Materials Stock Piling Act (60 Stat. 596; 50 U.S.C. 98-98H) is amended (1) by redesignating § 10 as § 11, and; (2) by inserting after § 9 a new § 10 as follows.

“Section 10.” Notwithstanding any other provision of law, on and after January 1, 1972, the President may not prohibit or regulate the importation into the United States of any material determined to be strategic and critical pursuant to the provisions of this Act, if such material is the product of any foreign country or area not listed as a Communist-dominated country or area in general headnote 3(d) of the Tariff Schedules of the United States (19 U.S.C. 1202), for so long as the importation into the United States of material of that kind which is the product of such Communist-dominated country or area is not prohibited by any provision of law.”

pursue one which will not conflict with the treaty obligation. There is no case which states that the President can violate treaty obligations acting alone.

What are the options? The President can:

- (1) prohibit the importation of metallurgical chrome from the USSR,
 - (2) remove chrome from the Strategic and Critical list;
 - (3) provide a stringent reading of the statute (we offered a number);
- or
- (4) make application pursuant to Article 50 of the United Nations Charter for consideration of special hardship, as did Zambia.

Certainly if the national security of the United States is at stake, then President Nixon should go before the Security Council and ask for the assistance of member nations.

The District Court held that plaintiffs lacked standing to bring suit indicating by way of dicta that it was a political question. The Court of Appeals reversed the standing issue but invoked the "political question doctrine," holding specifically that it would be improper to compel the executive to pursue one of the options which it felt was in the foreign policy arena. That court implicitly recognized, nonetheless, that a Security Council resolution is a binding treaty obligation of the United States. A petition for a Writ of Certiorari was filed on January 26, 1973. It is incumbent upon the Supreme Court to right the wrongs. We cannot treat our solemn obligations toward the United Nations so lightly.

The CHAIRMAN opened the discussion to comments and questions from the floor.

In connection with his suggestion of holding goods in trust for Rhodesia, Mr. Brown was asked whether he would agree (1) that the *cestui qui* is so vague as to cause that trust to fail and, (2) if the person is sufficiently defined to validate the trust, then is not the designation of that person too great a right to be vested in the British Government?

Mr. BROWN explained that he had not anticipated dealing with the concept of the trust in such a precise way. He had not considered whether the trust proposed would give rise to difficulties, but was simply proposing that Britain hold assets in trust until such time as a rightful government of Rhodesia is restored, not *the* rightful government. The suggestion of such a procedure was put forward because the trust concept avoids penal statutes.

In connection with Mr. MacCrate's statement that suits determining the validity of Braden's claims are pending in the courts of several European countries, Mr. MARTIN DOMKE submitted that one such suit has already been decided. On January 21, 1973, a German court supported Braden's contention but held that it did not have sufficient jurisdiction to decide the case. The German court applied the "center of gravity" test and determined that Braden had insufficient contacts with the forum to sustain jurisdiction. In a similar case in 1968, Duch claims were brought in German courts in order to determine the ownership of tobacco shipped from Indonesia to Germany. The Hamburg and Bremen courts

acted to the detriment of the foreign government in order to protect the German economy. Because Germany needed tobacco for trading purposes, much as it needs copper, the German courts indicated an unwillingness to apply any political policy which would act to the detriment of the German economy. This trend is consistent with the Court's recent disposition in the Braden case.

Mr. MACCRATE pointed out that the German court in the Braden case considered only the question of granting an injunction at an initial stage of the proceedings. The main action is continuing in which additional proofs will be offered which may lead the German court to a different analysis. Therefore, it would be a mistake to think that the preliminary proceedings are in any way dispositive of the case. He added that a clear statement by the French judge as to the applicable French public policy in the Braden case has made it clear that the court's disposition of the case will be affected by French public feelings regarding expropriation without compensation.

Referring to a UN study on the total compilation of trade with Rhodesia, which revealed that the total exports from Rhodesia were much greater than the amount of goods which other countries indicated they had received, the question was asked: how would such goods be treated by Britain under Mr. Brown's proposal?

Mr. BROWN observed that this was not a lawyer's question and therefore difficult to respond to. Any system will contain some evasion and some interesting characteristics. Nonetheless, mandatory sanctions have been applied by the United Kingdom, the USSR, China, and the United States with one exception. That exception is the effective use of intelligence gathering facilities. If this mechanism were utilized, the identity of lost goods could easily be determined.

The CHAIRMAN commented that UN sanctions have been imposed by the United Nations and approved by the General Assembly; yet the majority of members are importing those sanctioned goods from South Africa, although they do not admit it. The U.S. representative at the UN indicated that the United States, because of its formidable array of intelligence data, could keep track of what goods are coming in, although other goods are not so carefully scrutinized.

When Braden or Kennecott asks the Paris court not to recognize the taking by the Chilean Government but rather asks that the assets be held for their benefit, is not Braden asking France to apply its substantive law to affect the country of Chile? Are there limits of jurisdiction? Although limits are usually criminal, couldn't they be extended to political issues as are U.S. antitrust laws?

Mr. MACCRATE explained that the French court does not recognize this formulation of the French proceedings, rather it addresses itself to the specific property which is brought within French jurisdiction through international commerce. The French court has historically examined the taking without jurisdictional overtones.

The further question was raised: whether, in using the word "stolen" one did not have to ask under whose law? If it is the municipal court of

France, is it really applying international law? Mr. MACCRATE continued that France speaks in terms of French public policy. In Holland, there is recent precedent. There the court examined the question on the basis of international law. It determines international law in its own forum. But it is through the municipal law forum that international law is applied. The Swedish court will pursue international law from the viewpoint of its municipal forum.

Mr. GOLDMAN noted that the markets for the primary products of developing countries, which have been nationalizing foreign investments in recent years, are largely in the industrialized western nations, whose nationals are the principal source of direct investment in key sectors of the economies of these developing nations. The public policies of these western nations naturally seek to protect the investments of their nationals. For example, French law with regard to property takings was shaped largely as a result of the tremendous financial losses suffered by French investors in Russia, North Africa, and Spain. Mr. GOLDMAN again stated his belief that, in view of this history, the French court might well regard its own public policy as declaratory of a general principle of international law and find it controlling in the Braden suit. This would be counterproductive to the need to fashion a viable international compensation and valuation standard in the area of property takings which is based on contemporary, as opposed to customary, claims practices and settlements.

Mr. MACCRATE added that copper goes to copper markets. What can one possibly expect? The French court has already indicated that it will decide global issues, but those issues will be determined only with regard to specific property within the court's jurisdiction.

In response to a comment on the *Paquete Habana* case in which the court stated: "international law is a part of our law," the CHAIRMAN stated that this would appear to be an entirely esoteric discussion. Whether what we are discussing is international law or international law as a part of national law, he failed to see a relevant distinction. Perhaps, Mr. MacCrate and Mr. Domke have set up a Catch-22 situation in which all decisions will be made on the basis of the interests of the consumer since those are the only courts to which copper goes.

Mr. MACCRATE added that, if the forum is a substantial foreign investor and has interests to protect in the form of domestic investments abroad, then that forum is desirous of having law in this area. Responding to one of Mr. Goldman's points, Mr. MACCRATE conceded that the Chileans are unhappy about Braden's suits, but pointed out that very few litigations have been looked on favorably by the other side. That fact does not foreclose litigation nor does it imperil the possibility of settlement, *e.g.* Iraq, Algeria, and Indonesia. Many cases are settled before the jury goes out.

BEATRICE BRICKELL
Reporter

TERRORISM AND POLITICAL CRIMES IN INTERNATIONAL LAW

The panel convened at 8:30 p.m., April 12, 1973, Alona E. Evans * presiding.

REMARKS BY THE CHAIRMAN

We are all aware of the current nature of the topic which we are discussing tonight. It is too much with us. Our frame of reference is a rather painful record of terrorist action which across the past five years has sought out a wide range of victims and evidenced increasing ferocity, followed by retaliatory measures by states or private organizations. The terrorists' attacks have had various foci: internationally protected persons, for example. In the last five years forty-six internationally protected persons were subjected to attack or threat of attack, and sixteen of them were killed. This week, for example, the residence of the Israeli Ambassador to Cyprus was attacked. Then there have been attacks in terms of location or nationality, such as the Lod Airport massacre of last May, the Munich massacre of last September, the wave of letter-bombs last summer and fall. There is aircraft hijacking. The five year record has shown 311 successful international and domestic hijackings from 1968 to 1972, or a total of 358 endangered flights if one adds attempted hijackings. And in the course of these hijackings we find that some 200 persons have been killed or injured. It may be added with regard to the incidence of hijacking that in the first quarter of 1973 there were no successful hijackings in this country or abroad, although there were seven attempts, one of them this week. Yet another phase of terrorism is the attack on representatives of foreign enterprise; we saw two such last week in Argentina.

Efforts at deterrence and control have been variable. We see attempts to protect the internationally protected person through the OAS Convention of 1971 and the draft of the International Law Commission which is to be on the General Assembly's agenda at its 1973 Session. Hijacking has been covered by three conventions, and there is prospective action by the International Civil Aviation Organization next summer, looking to the provision of a sanctions agreement. Moreover, there is a proposed general Convention on Terrorism presented by the United States to the United Nations last September, discussed all fall, and also on the agenda of the United Nations for later discussion.

* Chairman, Department of Political Science, Wellesley College.

TOWARD LEGAL RESTRAINTS ON INTERNATIONAL TERRORISM

*by John Norton Moore **

On September 8 of last year Secretary-General Kurt Waldheim requested the inclusion in the agenda of the 27th session of the General Assembly of an item on "Measures to prevent terrorism and other forms of violence which endangers or takes innocent human lives or jeopardizes fundamental freedoms." The Secretary-General's request was triggered by the kidnaping and killing of eleven Israeli athletes participating in the Olympiad—a time for the brotherhood of man rather than the inhumanity of man. In a larger sense, however, the Secretary-General's request was a response to an alarming worldwide increase in attacks against civil aviation, internationally protected persons, and the transportation and communication ties which bind us together.

Despite the courageous action of the Secretary-General and the urgent nature of the problem, the organized community response has been agonizingly slow. Several myths have contributed to this slowness.

The first of these myths is that to oppose the actions of terrorists is to oppose the self-determination of peoples. This is perhaps the cruelest myth both because it poses a false congruence between self-determination and terrorism and because it neglects all other human rights. We need not inquire into the merits of any particular cause to know that the choice of means to an end may have profound value consequences. Both the Charter of the United Nations and the Declaration of Friendly Relations strongly reaffirm the right of self-determination. Yet at the same time they also reaffirm human rights and that actions to achieve either objective are not unlimited. The effort to achieve human rights in settings of armed conflict is, like the effort to promote meaningful self-determination, among the more promising developments of the last two centuries. We should remember that, even though the UN Charter permits individual and collective defense against an armed attack, it does not provide license to engage in any and all actions even when the objective is national survival. For example, the General Assembly has repeatedly affirmed that attacks against civilian populations, as such, are impermissible. Even the limited protection accorded in noninternational conflicts by Article 3 of the 1949 Geneva Conventions outlaws "violence to life and person" and the "taking of hostages," if directed against persons taking no active part in hostilities. We need not engage in trying to define "international terrorism" to reaffirm comparable distinctions. Significantly, this point was made twice in the study of these issues prepared by the United Nations Secretariat. In discussing "the Nature of International Terrorism" the Study pointed out that:

. . . even when the use of force is legally and morally justified, there are some means, as in every form of human conflict, which

* Counselor on International Law, Office of the Legal Adviser, Department of State.

must not be used; the legitimacy of a cause does not in itself legitimize the use of certain forms of violence, especially against the innocent. This has long been recognized even in the customary law of war.¹

And in concluding, the Study again stressed this important distinction:

There are some means of using force, as in every form of human conflict, which must not be used, even when the use of force is legally and morally justified, and regardless of the status of the perpetrator.²

A second myth is that measures to control international terrorism are aimed at a particular movement or cause. The threat, however, crosses all geographic and ideological lines. In Munich, eleven Israeli athletes were kidnaped and murdered. In New York, Arab and other Missions have been threatened. In Paris, a Palestinian bookstore was bombed. In Guatemala, a German and an American diplomat were murdered. In Sweden, 90 people boarding an international flight were held for ransom by Croatian terrorists. In Czechoslovakia, a Czechoslovak pilot was killed and his plane hijacked to the Federal Republic of Germany. And in Spain, a French consul was killed when the Consulate was bombed. Who can say what cause or continent may be featured next year?

A third myth is that we must first deal with the causes of terrorism before undertaking its control. A concern for the causes of terrorism is important, not only as a method of alleviating terrorism, but also because we must be concerned with the conditions of justice as well as the minimization of conflict. But to the extent that we can identify certain means of conflict which pose intolerable threats to human rights and world order, an effort to study the causes before undertaking the cure is dangerously irrelevant. The whole point is whether there should be community constraints on the means of conducting low-level and insurrectionary violence as well as in settings of full-scale war. I believe that it is vital for the moral health of the international community as well as for the promotion of human rights in settings of violence that certain means of conducting such conflicts be prohibited whatever the merits of the cause.

What are some of these means which must be prohibited?

First, no motive or cause can justify threats or attacks against international civil aviation. Such attacks threaten the lives of large numbers of innocent persons and undermine the trust we must have in international transportation and communication.

¹ "Measures to Prevent International Terrorism Which Endangers or Takes Innocent Human Lives or Jeopardizes Fundamental Freedoms, and Study of the Underlying Causes of Those Forms of Terrorism and Acts of Violence Which Lie in Misery, Frustration, Grievance and Despair and Which Cause Some People to Sacrifice Human Lives, Including Their Own, in an Attempt to Effect Radical Changes," *Study prepared by the Secretariat in accordance with the decision taken by the Sixth Committee at its 1314th meeting, on 27 September 1972, UN DOC. A/C.6/418 (Nov. 2, 1972).*

² *Id.* at 41.

Second, no motive or cause can justify attacks against diplomats or other internationally protected persons. This prohibition is essential if we are to maintain the ability to deal with one another that is so vital to the avoidance of misunderstandings among nations.

Third, no motive or cause can justify exporting terrorism abroad or inflicting one nation's conflict on another. Just as in recent years there has been an increase in attacks against civil aviation and diplomats, in recent months we have witnessed a new and equally dangerous trend: a trend for private groups to export violence abroad to countries not party to the conflict which spawned it. The Munich tragedy, which took place not in the occupied territories or in Israel, but in Germany, is an example. Similarly, the attack last year by Croatian terrorists was directed against an international flight and carried out in Sweden.

What legal initiatives have been taken to deal with these prohibited means?

The 1969 Tokyo Convention provided a series of rules for the exercise of jurisdiction over offenses committed aboard aircraft during flight. To deal specifically with the then increasing numbers of hijackings, a second convention was prepared in ICAO and formalized at a diplomatic conference held at the Hague in December of 1970. This Hague Hijacking Convention applies to any unlawful seizure or exercise of control, by force or threat of force, or by any other form of intimidation, committed on board a civil aircraft in flight, and to any attempt at such an act committed on board. A third convention was adopted at Montreal in September 1971, and covers the sabotage of aircraft.

Despite these conventions there are still a number of states which continue to provide a safe haven for hijackers. These states, which have not ratified the existing conventions, continue to allow hijackers to escape prosecution or extradition. While we continue to work actively for more general adherence to the Tokyo, Hague, and Montreal Conventions, we recognize that stronger action is required. Accordingly, we proposed a new treaty, supported most actively by Canada, which would provide a basis for joint action such as suspension of all air service to countries which fail to follow the basic rules set out in the Hague and Montreal Conventions. This would create a strong incentive for boycott action entailing isolation of a state from the international aviation system. In January, however, the ICAO legal committee rejected the idea of sanctions imposed on non-parties, although it approved in principle the establishment of a mechanism to make recommendations to non-parties. It also recommended that two proposals for new international instruments be considered in August at a special diplomatic conference and that an Extraordinary Assembly of ICAO consider two proposals for amendments of the Chicago Convention. The ICAO Council decided in March to hold the Extraordinary Assembly as well as the Diplomatic Conference in Rome from August 28 to September 21 of this year.

The first convention for the protection of diplomats was drafted by the Organization of American States at a special session of the OAS General Assembly held in Washington in 1971. The convention was

drafted in that forum because of the self-evident need for action in the Americas. There had been more than a dozen incidents of kidnappings and violence directed against diplomats in six countries of the Western Hemisphere in the two prior years, nine of which involved U.S. personnel.

The OAS Convention provides that kidnaping, murder, and other assaults against the life or personal integrity of those persons to whom the state has the duty under international law to give special protection, as well as extortion in connection with those crimes, shall be considered common crimes of international significance, regardless of motive. If the fugitive is not surrendered for extradition because of some legal impediment, the state in which the offender is found is obligated to prosecute, as if the act had been committed in its territory.

Although the OAS Convention is open for signature and ratification by states not members of the OAS, many states apparently prefer to develop a convention in the UN forum, based on the work and comments of a wider group of states. In its 1971 report to the 26th session of the UN General Assembly, the International Law Commission volunteered to develop such a convention if the Assembly thought it desirable. The 1971 Assembly agreed with the Commission and asked it to develop a convention on the protection of diplomats as quickly as it considered appropriate. The Commission responded to this call by developing draft articles as a basis for such a convention. These articles were submitted to the 27th General Assembly, which referred them to members for comments and which decided to adopt a convention at the 28th Assembly to be held this year.

With respect to the third prohibited means, the export of terrorist attacks abroad, the United States has tabled in the General Assembly, a draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism.³ The draft is offered, not necessarily as a final and definitive text, but as an illustration of one approach to the problem; an approach which I believe is fully sensitive to the aspirations of peoples of self-determination.

The draft convention does not seek to define "terrorism" or to deal with all acts which some might call "terroristic." Unfortunately, one man's "terrorism" may be another man's "heroism." Rather, the convention focuses on the common interest of all nations in preventing the spread of violence from countries involved in civil or international conflict to countries not parties to such conflict. In this sense it is a modern adjunct to the laws of neutrality which have as a principal purpose the limitation of conflict to the immediate belligerents when the conflict itself cannot otherwise be avoided.

The draft convention deals only with the most serious threats: acts involving unlawful killing, serious bodily harm, or kidnaping. The

³ Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism (Draft Convention to Prevent the Spread of Terrorist Violence), UN DOC. A/C.6/L.850 (Sept. 25, 1972).

mechanism employed by the convention to control the spread of conflict is to require that each of four separate conditions must be met before the convention would apply to these covered acts.

First, the act must be committed or take effect outside the territory of a state of which the alleged offender is a national. The draft does not seek to cover acts of civil strife directed against one's own government and committed within one's own state. The problem of maintaining civil order is primarily a domestic matter.

Second, the act must be committed or take effect outside the territory of the state against which the act is directed. That is, the convention is not aimed at conflicts taking place within a particular state and directed against that state even if non-nationals are involved. The involvement of non-nationals in civil strife is an important problem, but it is a problem dealt with many times by the General Assembly, most recently in the unanimously adopted Declaration on Friendly Relations Among States which declares that every state has a duty to refrain from organizing, assisting, or acquiescing in acts of civil strife or terrorism directed against another state. One exception to this second requirement under the draft convention is that acts committed or taking effect within the territory of the state against which the act is directed would be covered if they were knowingly directed against a non-national of that state. Such acts have the same potential to involve other states as acts directly exporting violence to their territory.

Third, the act must not be committed either by or against a member of the armed forces of a state in the course of military hostilities. The draft convention is aimed at largely unregulated irregular and low-level violence. It does not seek to replace existing or emerging regimes of human rights for settings of armed conflict such as the 1949 Geneva Conventions or the projected Protocol for noninternational conflicts to be considered by the 1974 International Red Cross Conference. Moreover, this third requirement also limits coverage to attacks against civilians and other innocent persons. This limitation parallels the general consensus in the law of war that it is impermissible deliberately to attack civilians.

Finally, the act must be intended to damage the interests of or obtain concessions from a state or an international organization. This provision differentiates covered acts of international terrorism from everyday crimes dealt with by national criminal codes.

Let me emphasize that all four of these conditions must be met for the convention to apply. Despite its careful focus, the convention would cover most of the recent acts of international terrorism evidencing the dangerous trend toward expansion of violence to states not party to a particular conflict. The convention would, for example, apply to letter-bombs sent through the international mails. Interestingly, it would also have applied to the assassination of King Alexander I in 1934, the triggering event for the 1937 League effort to control terrorism.

On the other hand, the convention would not deal with internal or

international conflicts unless such conflicts were exported to the territory of a third state or involved a third state by deliberate attacks against its nationals. Thus, the convention would not cover the acts of those fighting against the unlawful use of force to prevent their self-determination unless their acts were exported abroad to a country not involved in the conflict or were knowingly directed against persons taking no part in hostilities who were not nationals of the state where the act took place. The convention would also yield to any other more specialized regime governing attacks against diplomats or civil aviation. For example, the attack last year by Croatian terrorists in Sweden would be governed by the 1970 Hague Hijacking Convention if there were a conflict between that convention and the draft convention. In most cases, of course, such conventions would be mutually reinforcing.

By not covering all types of international terrorism, we do not mean to imply that all acts not covered are permissible. We are merely trying to concentrate, as an urgent first step, on those categories of international terrorism which present the greatest current threat and which have received the least attention. Many other kinds of terrorist acts, particularly the involvement of states in assisting terrorist groups or deliberate attacks on civilian populations as such, are already illegal under international law. They will remain illegal, wholly apart from the new convention. In fact, the convention specifically affirms the obligation of all states under the UN Charter and under the regimes of human rights for settings of armed conflict.

Once the critical threshold of coverage is resolved, the draft convention establishes substantially the same regime for dealing with offenses as the Hague Hijacking and Montreal Sabotage Conventions for the prevention of offenses against civil aviation. That is, states party to the convention would be required to establish severe penalties for covered acts and either to prosecute or extradite offenders found in their territory. There would be no need to return a person to a place in which there is reason to believe he may be subjected to harsh or unfair treatment. The choice of extradition or prosecution is in the hands of the state in whose territory the alleged offender is found.

These legal initiatives all follow the same pattern. First, they do not depend on defining "international terrorism." Second, they are all aimed at specific tactics of violence which significantly endanger human rights and the interests of the international community as a whole. As such, they seek to control such tactics whatever the merits of the cause. Third, they achieve their effect by requiring severe penalties for covered offenses and by creating a variation of universal jurisdiction requiring signatory states to either prosecute or extradite offenders found in their territory. And finally, by focusing on specific prohibited tactics they seek to create a climate of international condemnation of such actions; a climate which in turn would discourage the commission of such acts quite apart from the application of legal sanctions.

On December 18, 1972 the 27th Session of the General Assembly

adopted a resolution⁴ which reflects the universal recognition of the need for the United Nations to act against international terrorism. The mechanism for action was the creation of an ad hoc committee to study the causes of and measures for dealing with international terrorism. It is to be hoped that this committee will be able to make recommendations to the next session of the General Assembly that will be in keeping with the wisdom and courage of the Secretary-General in insisting that the United Nations deal with the problem of international terrorism.

TOWARDS THE DEFINITION OF INTERNATIONAL TERRORISM

*by John Dugard**

To the layman terrorism presents no problem of definition. To the lawyer, however, it bristles with definitional problems of the kind which has made the concept of aggression so illusive.

Basically the difficulty is to identify those acts of terror designed to bring about political change which disrupt international relations and which the international community views as contrary to desirable international norms of behavior. The problem is not a new one and recent history provides several examples of international cooperation aimed at the suppression of acts of violence which undermine the international order.

History of Attempts to Suppress International Terrorism

The law of extradition is the best starting point. While states had accepted the principle of nonextradition in the case of political offenders by the middle of the 19th century, they were unprepared to refuse extradition in the case of persons whose criminal acts extended beyond the national domain of states. Anarchism and the assassination of heads of state were the forms of conduct most frequently excluded from the benefit of nonextradition. During the 19th century the spectacular acts of terrorization committed by avowed anarchists led states to agree to the extradition of anarchists who were viewed not as the opponents of a particular government but as "the enemy of all Governments."¹

In 1856, following an attempted assassination of Napoleon III, Belgium excluded the assassination of a head of state or member of his family from the category of political offense and thereafter this exclusionary clause—known as the *attentat* or Belgian clause—was included in many extradition treaties. Today this clause finds expression in the European

⁴ G.A. Res. 3034 (XXVII) (Dec. 18, 1972).

* Professor of Law, University of the Witwatersrand, Johannesburg. The author wishes to express his deep gratitude to the Human Sciences Research Council of South Africa and the University of the Witwatersrand for providing a travel grant to enable him to attend the Society's Annual Meeting.

¹ *In re Meurnier* [1894] 2 Q.B.D. 415 at 419.

Convention on Extradition of 1957 and the Arab League Extradition Agreement of 1952, the latter agreement also permitting extradition in the case of acts of premeditated terrorism.

The most relevant antiterrorism precedent is the 1937 Convention for the Prevention and Punishment of Terrorism. This convention, which was signed by twenty-four states but never came into force, was a direct response to the assassination of King Alexander I of Yugoslavia in Marseilles in 1934 by persons, alleged to have been harbored by Hungary, who today would be described either as Yugoslav freedom fighters or terrorists (depending upon one's political ideology). Not surprisingly the convention was mainly concerned with the repression of those acts which had occasioned it and was primarily aimed at the protection of heads of state and other public figures.

The Convention for the Prevention and Punishment of Terrorism was intended to suppress acts of terrorism having an "international character" only and most of its provisions were devoted to a definition of the international element. "Acts of terrorism" were categorized in Article 1 as acts directed against a state which were intended or calculated to create a state of terror in the minds of a section of the public. Signatory states agreed to make acts of this nature criminal offenses if they were directed at another state and if they involved:

- (1) death or bodily injury to a head of state or a person holding a public position;
- (2) damage to the public property of another state;
- (3) dealing with arms and ammunition with a view to committing an act of terrorism;
- (4) any willful act calculated to endanger the lives of members of the public.

The convention reaffirmed that support for armed bands is contrary to international law and obliged states to punish incitement to commit terrorism. In effect, the latter provision makes hostile propaganda by private individuals against foreign states unlawful.

The most controversial issue at the 1937 Conference on the Repression of Terrorism, which finally approved the convention, was that of the extradition of offenders. Several European states wished to make it obligatory for states either to try or to extradite offenders, with no exception in the case of the political offender. This was, however, unacceptable to most Western European states and the final convention reflects a compromise which favored the latter group. While offenses under the convention were classified as "extradition crimes," the obligation to extradite offenders was made subject to any conditions for extradition recognized by the law of the requested state. In this way the Western powers retained their discretion to grant asylum to the political offender.

The 1937 Conference was largely unconcerned about the causes of terrorism, despite the fact that the Yugoslav "freedom fighters," whose action had prompted the holding of the Conference, undoubtedly had

legitimate grievances. In this respect the discussions at this Conference stand in sharp contrast to those on the subject of terrorism in the Sixth Committee of the UN General Assembly in 1972.

The postwar II period has seen the identification of several forms of conduct, which may broadly be described as terrorism, as contrary to international law. First, support for armed bands is categorized as a form of international terrorism by the Draft Code of Offences against the Peace and Security of Mankind and by several General Assembly Resolutions, notably, the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (GA RES 2625(XV)). Secondly, hijacking or aerial terrorism is outlawed by the Hague and Montreal Conventions. Thirdly, the kidnaping and terrorization of diplomatic officials in recent times has led to the adoption of an antiterrorist convention by the OAS and of draft articles by the International Law Commission. Both these instruments, however, are restricted to the protection of persons employed in the foreign service of states.

The year 1972 saw the proliferation of new forms of terrorism and the placing of the matter on the agenda of the General Assembly in a form which focused attention on both measures to prevent terrorism and the causes which give rise to acts of terrorism. After a thorough debate in the Sixth Committee the General Assembly referred the matter to an *ad hoc* committee to report at the 1973 session.

An Ideal Definition of International Terrorism

Ideally a treaty which aims at combatting international terrorism should:

(1) reaffirm that all states have the duty in all circumstances to refrain from encouraging guerilla activities in another state;

(2) prohibit acts of terrorism which disturb the international order and clearly identify the international element which brings the act within the jurisdiction of international law;

(3) oblige states to extradite or to punish offenders under the Convention;

(4) reaffirm the international community's abhorrence of state-controlled terrorism as expressed in the Nuremberg principles, the Genocide Convention, and the human rights provisions of the Charter.

Obstacles in the Way of a Convention

There are two main obstacles in the way of a convention of this kind: first, the dubious status of wars of national liberation and secondly, the highly treasured right of states to grant asylum to political offenders.

Wars of National Liberation: The Charter is clear on the circumstances in which force may be used lawfully in international relations, namely in the exercise of the right of self-defense and under the authority of the Security Council. Not only does the Charter fail to permit the use

of force to eradicate colonialism, but it expressly recognizes the legitimacy of colonialism in Chapter XI. Under the Charter, if one state harbors guerillas (freedom fighters/terrorists) who conduct military operations against another state, it makes itself guilty of an unlawful use of force.

Since the adoption of the Declaration on the Granting of Independence to Colonial Countries and Peoples (G.A. RES 1514 (XV)) the legitimacy of colonialism has become suspect and, as a corollary, the notion has grown that force may be used to destroy it. Resolutions of the General Assembly have given implicit support to this view by calling upon states to give "material assistance" to liberation movements and, in more recent times, by recognizing "the legitimacy of the struggle of colonial peoples for their freedom by all appropriate means at their disposal."² As the Charter does not specify wars of decolonization as an exception to its prohibition on the use of force, I still believe that wars of national liberation directed from the territory of one state at another are contrary to the Charter.³ While maintaining this "legalistic" stance,⁴ the absence of consensus on the legal status of liberation movements must be acknowledged. Moreover, although the General Assembly resolutions referred to above may not have changed the law of the Charter, they have conferred a *political* legitimacy on wars of national liberation.⁵

The political toleration of wars of national liberation is a fact of international life which cannot be ignored by the drafters of a convention on terrorism. This does not mean that the convention should give its express approval to such wars, as this would certainly be unacceptable to most Western states. All that is suggested is avoiding a "showdown" on this issue as it could only lead to the abandonment of a convention or the assertion of the legality of wars of self-determination, given the apparent numerical superiority of those in favor of such wars. Clearly a compromise convention is necessary which omits all reference to support for armed bands in the concept of international terrorism. This might be seen as heresy to those who maintain that "peace is the first value of the world community," but a realistic appraisal of current world values leads inevitably to the conclusion that self-determination is a co-equal prime value to many states.

International Terrorism and Political Offenses: Most states reserve to their own courts or executive the right to decide whether a fugitive requested for extradition is a political offender and most extradition treaties recognize this right. This is a practice which any multilateral convention seeking to impose criminal responsibility upon an individual

² See, for example, G. A. RES. 2936 (XXVII).

³ For an elaboration of the writer's views on this subject see *The O.A.U. and Colonialism: An Enquiry into the Plea of Self-Defence as a Justification for the Use of Force in the Eradication of Colonialism*, 16 INT. AND COMP. L. Q. 157 (1967).

⁴ See the criticism of the present writer's views by Georges Abi-Saab *Wars of National Liberation and the Laws of War* 3 ANN. OF INT. STUDIES 93 at 100 (1972).

⁵ See Inis L. Claude *Collective Legitimization as a Political Function of the United Nations* 20 INT. ORG. 367 (1966).

must acknowledge. The failure of the Genocide Convention to permit states to qualify genocide and related offenses as political offenses for the purposes of extradition resulted in Britain's withholding ratification until 1969 and has contributed to the opposition to ratification in the United States.

Although the practice of nonextradition of political offenders must be seen as an obstacle in the way of a successful antiterrorist convention, it should be recalled that from a doctrinal point of view the *international* terrorist does not fall within the category of political offender. As Shearer points out: "The clear rationale of the rule against the extradition of purely political offenders is that they do not, like 'common' criminals, generally present a threat to the life or property of citizens of other States."⁶ When a person commits an act which threatens the stability of other states or undermines the international order, he ceases to be a political offender and becomes a criminal under international law, like the pirate or hijacker. It was this philosophy which prompted an English Court in *Meurniers*⁷ case to grant the extradition of an anarchist on the ground that he was not an opponent of one government but of all governments. The war criminal, the offender under the Genocide Convention, and the person guilty of a grave breach under the Geneva Conventions of 1949 are likewise deprived of the benefit of nonextradition because "a crime against humanity or the rules of war is of international concern and should not be protected because it happens to have a national political objective."⁸

A full appreciation of the *raison d'être* of the nonextradition of political offenders might persuade states to adopt a less intransigent attitude to the extradition of *international* terrorists and lead them to accept the principle of *aut dedere aut punire*.

The United States Draft Convention

The Draft Convention for the Prevention and Punishment of Certain Acts of International Terrorism submitted to the General Assembly by the United States in September 1972 faces most of the difficulties to which I have referred and is worthy of more attention than it has hitherto received. Wisely it does not include a prohibition on support for armed bands in its operative part, although it does reaffirm this principle in its preamble by means of a reference to Resolution 2625 (XXV). Even this reaffirmation of a trite principle of law, however, is likely to provoke a response from Afro-Asian states which will probably insist *at least* on a restatement of the paragraph in Resolution 2625 (XXV) which appears to legitimize wars of national liberation. In the present climate of opinion there is much to be said for the view that the reaffirmation of support for armed bands as a form of terrorism should be omitted from the pream-

⁶ EXTRADITION IN INTERNATIONAL LAW 188 (1971).

⁷ *Supra* note 1.

⁸ J. E. S. FAWCETT in 34 BRIT. YB OF INT. LAW, 391 (1956).

ble; this would do it less harm as a rule of customary law than would a strong qualification in favor of wars of national liberation.

The draft convention defines international terrorism in limited terms, both as regards the act and the international element. Acts of terrorism are confined to homicide, serious assaults, and kidnaping, as well as participation in such offenses. Under Article 1 an act of terrorism assumes "international significance" if it meets four requirements:

- (1) it is committed or takes effect outside the territory of which the terrorist is a national;
- (2) it is committed or takes effect either outside the territory of the target state or within territory but is directed at non-nationals of the target state;
- (3) it is not committed in the course of military hostilities; and
- (4) it is intended to damage the interests of or obtain concessions from a state or international organization.

The result of this restrictive definition of "international significance" is that the standard type war of self-determination does not fall within the ambit of the convention, for in such cases the act either takes place inside the territory of the target state or is committed by a national of the target state. On the other hand it does punish acts of terrorism which have real international repercussions, such as the Munich incident, letter-bombs through the mail, the Lod airport massacre and the Khartoum killings. Consequently it serves to localize a conflict situation and prevent a war of national liberation from escalating.

The U.S. definition of international terrorism is narrowly formulated and should appeal to a wide cross-section of public opinion, particularly if one bears in mind the Marxist-Leninist ideological opposition to acts of individual terror. There are two principles, however, drawn from past experience, which, although implied in the U.S. draft, need to be stated more clearly: first, that motive is irrelevant in determining whether an act of terrorism has been committed (as stated in the OAS Convention of 1971 and the International Law Commission's Draft Articles on the protection of diplomatic agents); secondly, that the act should be intended to or calculated to inspire terror in a section of the public (as provided for in Article 1 of the 1937 Convention and in Article 4 of the Inter-American Juridical Committee's Draft Convention).

Article 3 of the draft convention obliges a state either to extradite an offender or to try him "without exception whatsoever" before the local courts. This article is modelled on Article 7 of the Hague and Montreal Conventions on aerial terrorism and at first sight is intended to prevent the international terrorist from being classified as a political offender and granted asylum. Commentators on the Hague Convention, however, have denied it has this effect and maintain that a state retains the right under the Convention to refrain from prosecuting a political offender. If the intention of the U.S. draft is to leave this matter in the same vague form as the Hague Convention in order to attract as

many states as possible to the draft convention, that is highly understandable. On the other hand, if the intention is to prevent the terrorist from being classified as a political offender in all circumstances, this should be expressly stated, as in the Genocide Convention, together with an explanation of the *international* interest in the extradition or prosecution of the international terrorist.

Finally, it is unfortunate that the U.S. draft convention does not condemn state-controlled terrorism. This is surely a matter to be covered in the preamble by reference to existing international instruments, such as the Genocide Convention and the Nuremberg principles. It should be made quite clear that the United States and the Western powers oppose such acts.

The main achievement of the U.S. draft is that it succeeds in localizing internal conflict situations by providing international measures for the punishment of those zealous revolutionaries who seek to dramatize their cause by acts of terrorism in foreign countries. While this is the only realistic approach in the present international climate, the world community cannot simply wash its hands of internal conflicts without these becoming areas of barbarism and suffering. Perhaps the best solution is to persuade parties to conflicts of this nature to extend the Geneva Conventions to their hostilities. Although at present this seems unacceptable to most parties engaged in wars of self-determination, it is hoped that they will come to realize the benefit of introducing some legal order into situations in which all humanitarian considerations appear to have been abandoned.

UNCONVENTIONAL VIOLENCE AND INTERNATIONAL POLITICS

*by Ibrahim Abu-Lughod**

I find myself in agreement with Professor Dugard's dissent concerning the title given us for discussion, namely the question of "terrorism." I have titled my discussion instead "unconventional violence and international politics."

Violence has constituted an important aspect of international relations for as long as recorded history. Despite all honest and important efforts, legal or otherwise, to control, regulate, and contain the kind of violence, legitimate or illegitimate, that can be utilized by states there is every likelihood that international relations will continue to be governed by the capacities of states to resort to violence in the pursuit of their real or imagined interests. There is hardly any dispute today that the capacities of the more powerful states to cause destruction to man and his environment are so great as a result of their steady progress in science and technology as in fact to terrorize the weak. I assume, therefore, that at least for the weak members of the international community, which

* Northwestern University.

happens to coincide with its Third World component, terrorism in international relations, irrespective of how defined, is largely an attribute of the strong. Recent history provides enough evidence of the use of terror techniques to induce whole populations to submit. The brutal suppression of the Hungarian uprising in 1956 and the perennial bombing, napalming, and defoliation effected by the United States in Vietnam are illustrations of the kind of terrorism exercised by the strong against the weak. For obvious reasons, this kind of terrorism is not what is often referred to by responsible Western observers and statesmen. It is useful to recall that the term Terror is used in the dictionary, whether the Oxford or the Webster version, in connection with officially inspired acts of states and seems to have been initially connected with the Reign of Terror in France when a national government endeavored to terrorize the population to submit unconditionally to its control.

There is, of course, a presumption that the violence exercised by states in their relations with each other is already regulated by the rules of war. Whether these rules enable states to commit acts of a terroristic nature is an altogether different question. And whether these rules are ever observed or enforced is similarly moot.

The question that has been posed for discussion certainly does not have the terroristic practices of states especially Western states as a background. It is obvious that the recent acts committed on behalf of the Palestinian Resistance and intended to advance the interests of the Resistance have given rise to the presumed search for a remedy; and with alacrity a spokesman for a state that has been the chief practitioner of terror bombing assumed a leadership role in attempting to stampede the world organization to adopt an ill-conceived draft of a treaty for the so-called prevention of terrorism. It is significant that the same draft treaty proposed to exclude terrorism practiced by the military forces from its provisions! It is to the credit of the members of the United Nations that they refused to be stampeded on an ill-conceived and largely fallacious issue, for it is quite obvious that neither the draft treaty nor the additional defense launched to promote its adoption had any connection with the tragedies that have given rise to the use of unconventional violence.

It is perhaps appropriate at this point to mention the supreme importance of the context and circumstances which surround the use of unconventional violence. Some may recall that in 1944 two members of the Stern gang, then of Palestine's Jewish community, assassinated in Cairo Lord Moyne, Britain's representative to the Middle East. Of course, the British denounced the act as terroristic but the Egyptian counsel for the two defendants pleaded with the court in the following terms:

The Jews tried everything, but nobody heard them. Some came to the conclusion that it was necessary to sacrifice themselves, in a savage act, so as to appeal to the world to save their people.

It is legitimate for us to inquire into the background of these acts of unconventional violence in the hope of at least arriving at some reason-

able understanding of their context. Should we pursue this line of inquiry, then we will be much more inhibited in passing moral judgment.

With the hopeful termination of the hostilities in Vietnam, several groups in the Afro-Asian world continue to engage in what is described as wars of national liberation. Without attempting to identify all those groups, we can mention the following: the Mozambique Liberation Movement; the Angolan, Guinea Bissau, and Cape Verdi; the embryonic liberation movements in Zimbabwe, Namibia (Southwest Africa), Azania (South Africa); and the Eritrean Liberation Movement. In the Middle East two movements can be identified; the Palestinian Liberation Movement and the Arabian Gulf movement (Dhofar). Obviously, there are others, less active at the moment, that undoubtedly will make their presence felt more strongly as time goes on. Though all these groups call themselves liberation movements, they can be differentiated in terms of their immediate opponents: The Eritrean and the Gulf movements are aimed at altering the existing national system, and challenging national authorities. All others are challenging either colonial or settler regimes. The distinction is important to bear in mind.

Whether the regime is colonial as it is in Mozambique, Angola, and Guinea Bissau or settler as in Rhodesia, South Africa, or Israel, the normal relationship prevailing between the two protagonists has historically been violent. It is widely recognized now that the onset of the colonial system and its perpetuation have been accomplished largely through the use of brute force. The Indian poet Tagore once addressed the European colonizers in the following terms: "You build your Kingdom on corpses." The dismantling of the colonial system almost everywhere in the world was possible only through systematic pressure, violence, and ultimately the waging of wars of national liberation conducted by the colonized. The colonized as well as honest students of colonialism have recognized the brutalizing and, fundamentally, anti-human experience of the colonial system. No one in his right mind today (or at any time if he happened to be one of the colonized or an honest student of colonialism) would attach any credence to the famous statement of Professor Schwarzenberger alleging "Thus, in the colonial wars in the western hemisphere, Africa, and Asia, the colonial powers . . . and the white settlers treated such rules of warfare as they did apply . . . merely as self-denying ordinances, due rather to their own sense of the dignity of man than to their more primitive enemies." To Afro-Asians, the following statement issued in 1926 by Ho Chi Minh is an authentic expression: "The 'refined' European bourgeoisie had terrified by its cruelty those whom it considered 'savages.' When one has a white skin one is automatically a 'civiliser' and . . . can commit the acts of a savage while remaining most civilised."

In the confrontation between the two protagonists, both colonial powers and settler regimes have resorted to all known methods of terrorism to intimidate the population into silence and submission. The terror inflicted on the colonial population has been no less than the terror

practiced by the Nazi regime either in Germany itself or in the countries that came under its occupation. Collective punishment, bulldozing of houses, plane hijacking and kidnaping (of Algerians by France), murder of leaders of national liberation movements (Mondlane and Cabral), wholesale imprisonment of ordinary citizens, preventive detention, expropriation of land and property, wholesale relocation of people into concentration camps or dumping grounds, as they are called in South Africa, are ordinary features of life in these areas. Sometimes these are carried out in the context of oppressive legal norms and "defense" regulations that have been adopted and implemented by colonial regimes; frequently, the colonial regime simply carries them out without resort to these norms.

Furthermore, in addition to the above measures, these states in their attempt to defeat the guerrillas have seen fit to bomb at will contiguous areas of sovereign states, to temporarily invade their territory, and to call upon each other for assistance. These varied acts of invasion and terror have been recognized as such by the United Nations which passed several resolutions condemning the perpetrators. While these resolutions have had a morally supportive effect on the oppressed populations in question, they have had no appreciable impact on the process of liberation.

Faced with powerful protagonists who derive their power in part from a subsystem of the international order, the liberation movements have received legitimacy by the recognition extended to them by the United Nations and some friendly powers. Their objective, namely the right to self-determination presumably leading to independent statehood and/or political and human equality, has been equally legitimized. The successful implementation of this objective would lead to the total independence of the Portuguese administered territories of Mozambique, Angola, Guinea Bissau; and to the transformation of the settler polities of South Africa, Rhodesia, and Israel.

It is quite obvious that the successful implementation of such an objective, which is superior to the objective of the colonizer or settler, will not be carried out voluntarily or as a consequence of the good wishes of the United Nations. The strenuous effort of the liberation movements is the only means of implementation. Yet one of the cardinal principles of all liberation movements is that the military struggle, important as it may be, is subsidiary to the political; the defeat of their opponents cannot be effected solely through military action. The varied military operations which they conduct are intended to demonstrate vulnerability, to strain the resources, and ultimately to crack the moral armor of the oppressor. The generation of protest movements within the colonial and settler regimes and the moral questioning within these societies are inconceivable without the use of unconventional methods of resistance which have been utilized by movements of national liberation. To the extent that both parties to the confrontation—the liberation movement as well as the colonizer and the settler—understand the authentic

message of the liberation movements, they may look forward to the day when they all can survive with dignity and live in peace with each other. Otherwise Kant's statement may be quite applicable:

it serves men right who are so inclined that they should destroy each other and thus find perpetual peace in the vast grave that swallows both the atrocities and their perpetrators.

COMMENTS BY NICHOLAS N. KITTRIE*

By way of introduction, I have certain preliminary comments which may be enlightening and provide for a sharper focus on the issues here. I wish to confess that I am an expolitical criminal, and I have not been rehabilitated. I have not been rehabilitated because I have never been caught, so the system never got a chance to rehabilitate me. As a youngster I plastered prohibited posters on the walls of the ancient cities of the Middle East. In my later youth I smuggled prohibited literature into socialist countries. And later yet I saw what I was not supposed to see, and talked to people I was not supposed to talk to, in fascist countries. So consequently I do have a special interest and a feeling for this business of political crime and terror.

Because of this special interest, I want, initially to draw a fine line between political crime and terrorism. Since both are listed together in the title of this particular panel, I think that some initial effort to distinguish between the two might be desirable.

I would like to suggest that political crime is primarily an offense against a political regime, that regime being either right or wrong. If the regime is wrong, political crime may be ethically proper. The state may call him a political criminal, but internationally he may be asserting an international right, such as the right to travel, the right to political association, etc. Indeed, were I to define political crime generally, I would say quite often it is what we lawyers would call *mala prohibita*—a prohibited evil. It is not an evil in itself; it is prohibited because a particular regime wants to prevent that particular behavior. Terrorism is somewhat different. Its very name implies a violent act. While designed to harm the regime and its institutions, it is also very definitely directed toward the populace and quite often against an innocent populace as well as strangers. Consequently, terrorism is more difficult to handle ethically than political crime. Since it is a violent act that does not always distinguish between the victims, it is what we lawyers might call a *mala in se*—an evil in itself, which may be contrary to basic precepts of humanity and social existence.

What we are discussing here today, political crime and terrorism, is indeed no different from the issue of civil disobedience and violence on the domestic scene. The question being raised is: Are you entitled

* Washington College of Law, The American University.

to use certain means to produce domestic, social, economic, and political change? I tell my students that within the existing constitutional system we have peaceful means to produce these changes, although some reforms are very difficult to introduce. The question I would ask is: when one moves from the domestic to the international scene, is violence, is civil disobedience, justified in order to produce certain changes? Is terror justified as a means for doing away with international injustice or does the international community provide an adequate framework within which grievances can be peacefully resolved and progress can be made without violence?

I would like to suggest that efforts to reduce world terrorism through general international agreement are doomed. There will be more Munichs, Lods, Khartoums, Angolas, and Bangladeshes in the newspaper headlines in coming months and years. The international community is divided between those nations that claim that peace and world stability would help resolve national and ethnic conflicts, and those that believe that racial and national wars of liberation are the only means for change. Unless the United Nations or some other conciliation agency demonstrates an ability to cope with these national and racial conflicts in Africa, the Middle East, the Far East, and elsewhere, no treaties between nations promise an effective program for the reduction of terrorism.

Acts of terrorism—especially such violent acts as murder, kidnaping, extortion, and bombing—are already prohibited by the laws of all civilized nations. If these laws are not currently effective in curbing terrorism, it is because terrorists work underground and are often difficult to detect. Furthermore, these domestic laws are often not enforced because the terrorist villains of an adversary country are often viewed as national liberation heroes by other countries. When sympathy for certain guerilla groups is strong enough to prevent a nation from prosecuting murder, kidnaping, and other violence committed within its own boundaries, no international convention will accomplish sterner enforcement. The problem with international terror is that many sovereign nations believe in its justification. In the eyes of many nations national liberation is more important than world tranquility. In their eyes even the harm produced by terrorism to innocent people is not a sufficiently compelling argument against it.

Even the United Nations has not been able to resolve this ambivalence. Recently the United Nations Human Rights Commission declared that *apartheid* is a crime against humanity. If so, any fighter against racial inequities using any means should be viewed as a righteous man and hero rather than terrorist. Indeed, he is a fighter against crime. Will an international treaty to curb and prosecute terrorists have any viability in the face of such conflicting world values?

The U.S. efforts to advance a new international convention against terrorism in the face of these realities are destined to failure. Indeed, the convention proposed at the UN by Secretary of State Rogers last fall is merely a proclamation of good intentions, and, even if accepted,

of little relevance to the issues at hand. At best the convention can be described as an effort to stop a crumbling dike by placing a thumb in one of the smaller cracks.

The U.S. proposed convention does not deal with acts of terrorism by or against armed forces. Consequently the recent incursions by Israeli soldiers into Lebanon are not subject to it. Should Arab terrorists, likewise, be able to secure official governmental authorization by such a country as Libya, they too would be exempt from the treaty. The treaty does not affect a country's handling of "favored" terrorists and their organizations within its boundaries. It does not interfere, for example, with the right of Uganda's General Amin or the President of the United States to furnish tolerance or shelter for guerilla forces intending to cause terror in South Africa or Cuba.

The proposed U.S. convention deals only with remote and outlandish instances of terrorism. It would apply only to a situation where a terrorist from, say, Uganda goes to England and while there kidnaps or assassinates a South African national as a means of protest against South African apartheid. The convention would similarly apply to the same Ugandan going to South Africa and there kidnapping a visiting German national as a means for securing the release of South African political prisoners. In both instances, however, the domestic laws of England and South Africa are violated by these acts of terrorism. It is likely that the countries involved would prosecute the offense without benefit of new international treaties. It is possible, however, that the same Ugandan would seek to perform his terrorist act in a country more favorably inclined towards his mission. Suppose he assassinates a South African national in Zaire. Should Zaire be inclined to ignore murder under its own laws, no international convention is likely to change its response. At the very least that Ugandan in Zaire would be accorded an opportunity to disappear mysteriously from his prison cell prior to trial or extradition. This has recently happened in Egypt; this also recently happened to Cuban "terrorists" in the United States.

In the face of national and international disagreements regarding "the right to terror" no attempt at meaningful international legislation is possible. Neither a nation nor the international community can pass laws and expect them to be observed, unless there is a minimal amount of community consensus. Such consensus does not now exist with regard to terrorism. The acceptance of the U.S. proposed convention would, at best, be a token accomplishment. At worst it opens the door for further ideological UN debates on whether the terrorist or his pursuer—the allegedly exploitative Western, racial, and capitalistic forces—is to blame.

What is necessary, instead, is a more realistic and narrowly focused international effort. Such effort could come in two parts. The first, directed towards the regulation of the laws of terrorism, would be similar to previous effort to regulate the conduct of war. This means accepting the reality that terrorism is here to stay, especially since "official" conventional wars are on the decline. Such new rules of terrorism would seek

primarily to reduce the hazards to innocent parties, such as passengers, tourists, and nongovernmental personnel. The aircraft antihijacking conventions are examples. Violations of such standards would then be subject to strict penalties by all governments concerned. The second effort must be directed towards building more meaningful and innovative international agencies that can offer conciliation for the types of conflicts which seek expression in terrorism: the Irish conflict, the Indian-Pakistani conflict, the Arab-Israeli conflict and others. Clearly, what is needed are new institutions for handling and defusing racial, ethnic and national conflicts, not more empty yet controversial legal documents.

COMMENTS BY ALAN F. SEWELL *

Having heard the presentations of Professors Dugard, Moore, and Abu-Lughod and being required to respond to them, I find myself in a somewhat strange and uncomfortable position. I assume that most of the men and women in this room are lawyers or at least have a strong orientation to the law. I, however, am a social psychologist and not a lawyer. But as a result of watching a number of Perry Mason reruns on television, I know that my ignorance of the law is no excuse.

And, since turnabout is fair play, I will state my belief that ignorance of human nature and behavior is no excuse for the law. The sharp disagreements between Professors Dugard and Moore on one side and Professor Abu-Lughod on the other, I believe, are an expression of one of the principal shortcomings of the law: a deliberate and traditional avoidance of questions of *motivation* and self-imposed restriction to questions of *intent*. My limited understanding of the concept of *intent* informs me that lawyers are more concerned with the quiddity or the "what-ness" of an act, while I am more interested in the "who" and the "why" of the act; these are, of course, motivational distinctions of the act.

The proposed U.S. Draft Convention on Terrorism, favored by Professors Dugard and Moore, serves as a case in point. It proposes the establishment of a legal net which will catch some strange fish, indeed. Without very much extension, for example, Laszlo Toth, who, a year or two ago, attempted to destroy Michelangelo's *Pieta*, could be branded as a "terrorist." (He could, of course, also be branded an "international criminal," although that identification seems no more fitting.) Similarly, the killing of an American in the Louvre by an Arab, for example, could be labelled a "terrorist act," especially if the American were a diplomat. Such a label would be obviously inappropriate if one or the other of the participants, however, were attempting a robbery; or if one should be an art critic and the other a disgruntled artist, or if one or the other were known to have had a long history of mental illness.

The point is that the draft convention and nearly all actual and proposed laws pretend to avoid questions of motivation which cannot be avoided.

* De Paul University.

They will, therefore, catch some "strange fish" and completely miss others.

Professor Abu-Lughod argues that terrorism is "unconventional violence." I am reminded of Robert Ardrey's definition of violence as the pursuit of conventional goals by unconventional means. What we must seek to learn is *why* unconventional means are employed; again, the question of motivation. The speakers have carefully avoided any definitions of "terrorism" or "political crime," but I suggest that definitions based upon the behavior and motivation of the offender will provide a clearer picture of the nature of his act and may recommend more effective means of prevention and deterrence.

Since nearly all acts we call "terrorism" or "political crime" include an element of common crime, I believe it is quite possible to limit the concept of *intent* to the common crime component of the act (that is, the specific antisocial behavior involved), but to employ motivational concepts in order to define the political or nonpolitical character of the act. The facts of the case could be determined by ordinary legal procedures designed to establish whether the criminal act did indeed occur and whether the accused did or did not commit the act; but the disposition of the "guilty" offender would depend upon his motivation. As appropriate, he might be extradited, incarcerated in the country of commission, or committed to a mental institution in any country.

Because of its denial of motivational considerations, I cannot find the proposed draft convention sufficient, realistic, or acceptable. It ignores the sources of human behavior, whereas effective and acceptable legislation must always be based on a clear understanding of those sources.

Referring to Professor Kittrie's point concerning the lack of an international consensus which would make an antiterrorist convention possible, Professor DUGARD observed that there was some consensus but within a very narrow limit. It was for this reason that he supported the U.S. Draft Convention, because it does seem to take advantage of that very narrow consensus on the part of the international community. Professor Sewell's statement that perhaps the person who damaged the Pieta would be guilty of an act of terrorism under the U.S. Draft Convention is not accurate, Professor DUGARD pointed out, for the convention only covers acts directed at human life.

Professor MOORE considered that Professor Abu-Lughod had put forward two myths, one old and one new. The old myth is that somehow we are engaged in an exercise that is directed only against Palestinians. In his remarks, Professor MOORE pointed out, he had given a series of other instances which also would be dealt with by the draft convention. None of us can, looking ahead two, five, twenty years, know exactly what kinds of conflicts will be central in that era. Hopefully it would not be the Arab-Israeli conflict and hopefully the convention to prevent the spread of terrorist violence would still be serving a useful function. It certainly was not the Arab-Israeli conflict that prompted the efforts

of the international community to respond to terrorism in 1937 in the League of Nations.

The new myth is, Professor MOORE felt, somewhat more dangerous. It is that somehow we should not deal with unconventional violence because we have not controlled conventional violence. That can be called "The Fallacy of the Even-handed Cop-out," which is nothing more than a kind of comparison of things that are not very comparable. Of course we want to try to deal with conventional violence and the international community does try to deal with it. We have the Genocide Convention and the 1949 Geneva Conventions on the laws of war and the customary laws of war among other efforts. We are making continuing efforts in the context of the I.C.R.C. to get far better kinds of controls than we now have for dealing with conventional violence. Professor MOORE failed to see the connection between our inability to have a perfect world in which conventional violence is controlled and a conclusion that we should not make any efforts either to pass normative judgments or to control techniques of unconventional violence.

What is most troubling about Professor Abu-Lughod's approach is that he really tells us very little more than that we have violence in the international community. He gives very few hard judgments about, for example, when is violence justified in the international community and very few references to Article 2(4) or Article 51 of the United Nations Charter. Instead, he would have us regress to an earlier period and an earlier set of normative judgments under the Just War doctrine. More importantly, he does not then go on to a second major set of issues in conflict management; what kinds of restraints ought there to be on the *conduct* of violence, aside from the question of when it can be used in international relations. Professor MOORE asked whether Professor Abu-Lughod thought that it is perfectly all right to hijack planes carrying innocent persons, miles away from any area of conflict, and endanger their lives through kidnapping or blowing up the plane. Is it Professor Abu-Lughod's personal judgment that it is perfectly all right to kill diplomats in international relations as a technique of unconventional violence? Thirdly, Professor MOORE asked Professor Abu-Lughod whether in his judgment it is perfectly all right to export conflict abroad to third nations.

Concerning Professor Sewell's remarks on the attack on the Pieta, Professor MOORE pointed out that of course the draft convention would not cover such an act just as it does not include many other kinds of criminal activities under domestic law, even though some may obviously have very great consequences for the international community.

As part of the "art of the possible," and in order to get some international agreement on at least some useful measures, it is necessary to define what you want to cover as precisely and carefully as you can. The draft convention does not deal with all hijackings; it is not concurrent with political crimes. Moreover, the distinctions drawn as to the covered hijackings are not arbitrary: they are based on a specific desire to achieve

coverage in precisely the four cases that are set out, with particular conditions required. As to Professor Sewell's criticism that the convention does not set out a definition of a political crime, Professor MOORE believed that to try to define political crime was a hopeless approach. The most useful question is what particular acts in the real world should be prohibited by the international community.

Turning to Professor Kittrie's criticism that the draft convention won't work and the effort is doomed, Professor MOORE did not share this pessimism. It is true that no legal initiative, particularly a very narrowly drawn convention, is going to solve the problem of international terrorism. But that is not the issue. The question is, can the convention make a contribution to the problem? Professor MOORE believed it could in the following ways. First, the convention would require extradition or prosecution not required under existing law. Secondly, it would require some states to pass laws in order to prosecute persons even if they were not nationals of that state and the crime did not take place in that state. That is almost unheard of under most domestic political systems and in most states it would require implementing legislation. If a significant number of states did in fact adhere to this convention, it would at least help by eliminating a very substantial number of geographic sanctuaries to which the offender could go. Lastly, and perhaps most importantly, the effort to draft the convention is basically one of educating the international community on the question of the kinds of normative and moral judgments that we must draw as to what kinds of unconventional violence should be prohibited and what kinds we can, for the moment, do nothing about.

As to Professor Kittrie's second basic criticism, that the coverage of the draft convention is too broad in some cases and too narrow in others, Professor MOORE again referred to "The Fallacy of the Even-handed Cop-Out." There would be no chance to get this convention approved in the international community, he pointed out, if it tried to deal with all the actions that we would like to see controlled, including the laws of war and the kinds of violence that take place within states (such as Uganda). The effort we are undertaking is simply to try to deal with a particular kind of international conflict that needs to be singled out, condemned, and dealt with insofar as we are able to do so.

Professor ABU-LUGHOD felt Professor Moore's attachment to this presentation essentially represents two kinds of interests: one is a professional interest and the second—and more important of the two—is that he represents a system of power that has been the chief practitioner of oppression. In Professor ABU-LUGHOD's view, in listing priorities of the crimes that have been committed and are likely to be committed, the chief offenders of international law would be found by an impartial jury of peers—but not peers as practitioners of terror—to be the Pentagon people and the President who initiates terror bombing and rapalming of innocent civilians, for which there are rules that need enforcement.

Professor KITTRIE repeated that most of the behavior which this particular proposed convention prohibits is already prohibited by the states

where it occurs. They do not always seem to be willing to enforce their own domestic law and, therefore, he doubted that the international convention would accomplish much. Basically he felt that the accomplishments of this convention would be minimal; so minimal that the struggle within the international community to have it adopted is unjustified and not worth the time. It would be more worthwhile for Secretary of State Rogers and Professor Moore to travel in all these countries, informing public opinion of the causes and hazards of terrorism and convincing them to seek national solutions.

KRESZENTIA DUER
Reporter

THE IMPACT OF A MULTIPLE BALANCE OF POWER ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS

The roundtable was convened at 10:30 a.m. April 13, 1973, Eugene V. Rostow* presiding.

The CHAIRMAN opened the session by observing that, notwithstanding the implication of the roundtable's title, the dominant characteristic of the world today seems to be not a diffusion of power but rather a tendency toward a concentration of power, bipolar at the least and perhaps even implying a necessity for cooperation.

REMARKS BY MORTON KAPLAN**

Less than a generation ago international relations textbooks either referred to the international system as a realm of anarchy or applied to it global generalizations such as the balance of power. That the number of major states in the system, their economic and military potential, their alliance patterns, and so forth might affect the resort to force and the results of such resort was largely foreign to analysis.

The public had a still more simplistic picture of the entire process. War was the product of power politics; therefore the way to avoid war was to avoid power politics. World government would be the best means for doing so. Short of that, democracy, a league of nations, and open diplomacy openly arrived at would solve the problem of war. The first flush of Wilsonian idealism established the League of Nations. The French request for alliance support against the potential resurgence of Germany was met with arguments for collective security. The League, in effect, destroyed the normal mechanisms of the nineteenth century for controlling and moderating the use of force. Unfortunately, it did not replace those mechanisms with anything that was workable.

* Yale Law School.

** University of Chicago.

During World War II, the Roosevelt Administration decided to resurrect the League under the name of the United Nations. One great defect of the League—the absence of the United States—would be remedied in this new forum. The inability of the League to act in cases of aggression would be rectified by basing Chapter VII operations of the United Nations on the cooperation of the victorious major states within the framework of the Security Council.

That Europe would be a power vacuum, that potential disturbances in the shattered European economies and polities would establish enormous conflicts of interests between the only two states with major world power—the United States and the Soviet Union—apparently never occurred to those who designed the Charter. As might have been predicted, the United Nations did not work very well either. Superficially it worked in the case of Korea in 1950. However, it did so because the United States directly involved itself and *it* did so because the international system then was a bipolar system. A major advance for world communism was a direct threat to the United States. This is precisely the mechanism that is changing as the world shifts to a multipower situation.

The United Nations, however, has not been entirely useless. Although the attempt, which some impute to the Charter, to outlaw the resort to force was surely unsuccessful, the Organization has had its minor successes in moderating the resort to force, particularly in situations of minimal conflict between the United States and the Soviet Union: *e.g.* Cyprus, Israel and the Arab states, the Congo, and others. This situation may not be changing radically, although the admission of Communist China to the United Nations may possibly have an impact on the extent to which the Organization can work with respect to this kind of dispute.

The United Nations surely is incompetent to invoke its intended powers in cases such as Hungary in 1956, Czechoslovakia in 1968, the intervention in the Dominican Republic under Lyndon Johnson, the Cuban missile crisis, and other matters of this kind. Yet not all its attempts to moderate the use of force, to control the consequences of the resort to force, and to establish conditions for its exercise have failed.

The more modest objectives are surely the more legitimate ones. The major problem, at least the one that we may be capable of dealing with, is that of controlling the continuance of the resort to force and the consequences following from it by regulating those justifications that will be accepted by the world community.

That the mechanisms of bipolarity which produced the American response to Korea may not operate in the world toward which we are moving may not be entirely a tragedy. The fact that a world power will impact on every major area of disturbance (except perhaps Africa) may establish a strong incentive to apply techniques for closing off resorts to force. The importance of each region containing world powers to other world powers may require them to reach some sort of minimal agreement on what the rules of the game are to be.

The existence of nuclear weapons intensifies this incentive. Even though it is hyperbole to suggest that every resort to force includes a risk of nuclear escalation, this consideration will never be far from the minds of statesmen. Moreover, interlocking global economic enterprises will tend to increase the incentive still further. Thus, there will be potentially effective demands for an increasing level of minimum world order.

Our problem is one of effective diplomacy in successfully managing these demands. To understand how and why we can manage them in the most appropriate way will require us to understand how the international system structures the mechanisms of demand and response. We will not be able to discuss these matters in terms of moralisms or legalisms if these be divorced from intelligent macroanalyses of both a political and economic order. These remarks are prolegomena, but they indicate the direction in which research and thought should take us if we are to respond effectively to the problems we are going to face.

In reference to Dean Rostow's remark that the world will, for at least the next ten years, remain bipolar, it is important to note that no other power (despite the remark of Richard Helms that China is becoming a major nuclear power) will be able to challenge either the Soviet Union or the United States in this area. In other respects—political and economic—the realm of power of the United States and the Soviet Union is diminishing. The impact of Japan on the scene is largely economic but will become political as time goes by. The impact of Europe is primarily economic, although more political than that of Japan. Thus at the nuclear level the world remains bipolar, while at the conventional level the world is certainly less bipolar than it was in the past. At the economic and political level, the world can be seen increasingly as a multipower balance which will in turn establish a number of restraints on the major powers.

The CHAIRMAN, summing up Mr. Kaplan's thesis, agreed that in the first period after World War II, the underlying tension between the Soviet Union and the United States meant that there was no possibility of enforcing the Charter against most violations of Article 2, paragraph 4, for example, in such instances as Czechoslovakia and Hungary. This situation may change because of the immense changes now taking place in the underlying power structure of the world. The recent shift in Chinese policy in response to Soviet threats, reinforced by the implacable logic of the nuclear problem, requires that China as well as Japan, Western Europe, and other countries and areas remain, in one sense or another, under the American nuclear umbrella.

REMARKS BY ROBERT OSGOOD*

I agree with the foregoing description of the central international system and the structure of power in it. In military terms it is almost

* School of Advanced International Studies, the Johns Hopkins University

as much conventionally as nuclearly bipolar. Indeed the whole logic of the Nixon Administration's policy presupposes the stabilization of a bipolar balance as the basis for a more multipolar diplomatic pattern among the five major centers of economic and diplomatic power. It also presupposes that the stabilization of this balance is the condition for a retrenchment by the United States. Such retrenchment is to be manifested in a lower level of effort and a more indirect involvement rather than in a disengagement from our political commitments or previous involvements throughout the globe. Thus, as far as the United States is concerned, the very condition for detente is a more subtle and diversified global engagement by the United States. The center of American foreign policy remains, as it was supposed to be in some previous administrations, the orchestration of a global *modus vivendi* between the United States and Soviet Union. Now this *modus vivendi* is supposed to be manifest in a whole network of agreements and understandings linked together in such a way as to reduce room for maneuver and to moderate the behavior of both superpowers. On the basis of tacit agreements between them relating to mutual cutback of intense and often disruptive competition in the Third World, it may be expected that (1) the patterns of diplomatic conflict and alignment among the five major centers of power will become more complicated and diversified and that (2) military security concerns will recede into the background of international politics and a whole set of other issues will come to the front.

A number of questions arise regarding this new design. Can the structure of power that emerged in an era of confrontation survive in an era of negotiation? This is in part a question of whether our relations with Western Europe and Japan will remain in their mutually satisfactory state indefinitely because both of these centers appreciate the value of the United States and the Soviet Union managing the central military balance. Or, in a period in which we are improving our relations with adversaries, will tensions with allies arise in various ways that might undermine the structure of power on which the present international order is based? I don't know the answer, but I believe our relations in the future will be concerned with devising new modalities of compromise and consultation with our major allies as much as with improving our relations with adversaries.

The other question posed by this transitional form of international order is what will be the effect on the international system of the new forms of international politics. Principally, what will be the effect of the new politics of monetary and trade relations and the new politics relating to resources and access to resources, in particular questions of exploitation of the oceans and energy.

In many ways these kinds of issues create a new pattern of conflict and alignment among states that does not coincide with the central structure of power. The conflicts and alignments created by military security issues are significantly different from those created by the new issues that are coming to the forefront of international politics. Moreover, new

actors are becoming important in international politics, actors which are not under the full control of governments. The multinational corporations are only the most noticeable of these.

What the superpowers are thus facing, even if the central structure persists, is a declining control over many aspects of international politics which may challenge the present world order. This therefore presupposes a greater collaboration among developed states on a multilateral basis. It also presupposes not only some universal international institutions to handle such questions as who gets what where but also regional institutions and laws to handle the whole realm of issues arising from these new areas of international politics, which do not nullify the old international politics but do complicate them.

The CHAIRMAN observed that the speaker had brought out very well not only the integrative force of the nuclear dimension of world politics which in his judgment is irreversible, but also the integrative forces at work in the realm of economic affairs. Problems of trade, investment, and above all monetary affairs and the problem of access to oil are creating new patterns of deepened integration. New techniques of diplomacy are required to manage those processes of integration. This may well imply, as Mr. Osgood suggests, a greater state of political tension and therefore more restraint on the use of force by states with a greater possibility than we have had in the past for approaching the norms of the Charter with regard to the use of force.

REMARKS BY HERBERT SCOVILLE*

In speaking about arms control negotiations in a multipolar world, it is necessary to bear in mind that we are not really in a multipolar world right now. But perhaps we are starting toward one, at least as far as nuclear power is concerned. Britain, France, and China possess only relatively small nuclear forces at present but they will grow in time and eventually will have to be taken into consideration at least in arms control negotiations involving nuclear weapons. France and Britain at the present do have a nuclear deterrent force which would deter an attack as far as the Soviets are concerned. The status of the Chinese nuclear force is very much more uncertain. It is possible that they now possess a very limited deterrent to an attack by the Soviet Union. Certainly there is no question that at the present time they do not have any means by which they can threaten, even in retaliation, a nuclear attack against the United States. As a consequence, the Chinese do not provide any direct threat to us and we can go ahead and negotiate agreements with the Soviet Union without any real consideration of Chinese participation. One need not conclude from the growing Chinese nuclear power that they must necessarily be brought into the SALT negotiations in the near future.

Once we have given up the myth that we could build an ABM system

* Former Assistant Director, Arms Control and Disarmament Agency.

to protect us from a growing Chinese threat then it becomes clear that there is no weapons procurement we need to undertake to counter the Chinese for the next ten, fifteen, or even twenty years. We can thus get together with the Soviets and agree not only to limit the upward growth of our nuclear weapons but also to cut them back regardless of what the Chinese are doing. This does not mean that we shouldn't consider the Chinese and attempt to get them into dialogues concerning the control of nuclear weapons. This could be especially useful in those areas where the size of the nuclear force is not significant, such as questions relating to nuclear safety and assurance against accidental firing of nuclear weapons. An accident, even an accident produced by a small nuclear power, can have tremendous consequences. This is an area in which we should now start to induce discussion through any channels available, even if it is a one way street and we provide all the information.

There are other areas in which it is perhaps not so important to bring the smaller nuclear powers into discussion. It would be desirable to get Britain, France, and China involved in a nuclear test ban treaty. But even without their participation, an unlimited test ban treaty between the United States and the Soviet Union would still be very useful. The U.S. position has never been that Chinese participation is necessary. On the other hand, the Russians were unfortunately somewhat equivocal at the opening of the recent CCD negotiations in Geneva in March for they stated that they were in favor of a test ban, but in order for it to be effective it must be comprehensive and have the participation of all the nuclear weapons countries. Since there is very little hope of Chinese participation at present, this dampened the hopes of successful negotiation of a comprehensive test ban.

For many years arms control negotiations were utilized by the Soviets as a propaganda device, but in the last several years very useful negotiations have taken place. It is time now to start a similar dialogue with the Chinese, recognizing that we will not have great success for some time to come. There has been a proposal for a World Disarmament Conference, which, strangely enough, both the Chinese and the United States strongly opposed. Every other nation in the world endorsed it. Last fall, however, the Chinese, under pressure from the nonaligned countries, did agree to a preparatory conference. The United States stood alone in opposition, contending that the conference would be unproductive as arms control could not be accomplished with 100 nations sitting around the table.

I do not fully agree with the United States position in that I believe we should make every effort to start a dialogue. Although it may be unproductive at the outset, we must realize that unless we start talking with the Chinese we are never going to be able to bring down the barriers. We must not, of course, allow the Chinese to sabotage the constructive efforts of the United States and the Soviets and also of all other nations to halt the arms race. But this danger can be minimized with proper planning. We can continue to make progress in areas where

Chinese participation is not essential, while beginning broader discussions with a view to the more distant future of a multipolar world.

The CHAIRMAN remarked that the point of U.S. nuclear policy, and hopefully that of the Soviet Union as well, is that the nuclear weapon not be used, that a stalemate be achieved so that the brandishing of the weapon would not be a threat in world political affairs. To achieve that goal we must maintain not only a second strike capability but also an array of other deterrents so that crisis management can be conducted on a non-nuclear level. That is the essence of the integrative force of the nuclear problem in world politics. It is the reason why, in a pessimistic sort of way, the CHAIRMAN was rather optimistic about the impact of the nuclear power balance on the possibility of doing much more to enforce the Charter in many crisis situations which have thus far been intractable.

REMARKS BY SAUL H. MENDLOVITZ*

It is a basic premise of my remarks here today that it is necessary to take quite seriously not only the rhetoric but the reality of the term "the global village." That is to say, it is now clear that 98% of humankind sees the entire world as human society. This phenomenon, it should be underscored, is a psycho-historical first, and has had a drastic impact on the images and the attitudes we have in regard to authority structures within domestic societies, as well as within the international community. One of the implications of saying that there is a "global village" is that sometime within the next two decades many people throughout the globe are likely to begin to discuss quite seriously the governance of that global village in ways perhaps which we previously had eschewed. I should like to address myself initially to that theme and then come back to the role of the United Nations and some specific recommendations.

Over the next ten years there will be an increasing number of responsible and thoughtful persons throughout the globe who will be attempting to understand and cope with the major global problems. In my view five such problems have already emerged and been identified for discussion and attention. They are: war, poverty, social injustice, ecological instability, and alienation or identity crisis. For people concerned with these problems, "solutions" are realization of human values. Thus we might say that what those of us who are concerned with these global problems are trying to accomplish is the realization of peace, tolerable conditions of economic well-being, social justice, ecological stability, and participation on the global level.

And to complete this somewhat truncated frame of reference, it is my view that these five problems/values are being propelled by three major historical processes; or if you will, revolutions: the tech-

* Newark School of Law, Rutgers University.

nological-scientific revolution; the closely allied economic and interdependent revolution; and the ideological revolution of egalitarianism. I might just note in passing that of these three, the egalitarian revolution has been least analyzed, but may in fact account for much of the disorder, dislocation, and social tensions throughout the globe.

This crisscross of problems and historical processes (revolutions) has been moving us steadily to the point where discussion of a new governance for the world community has become a necessity. In this connection I agree with Mr. Osgood that there has been an enormous growth and proliferation of other actors in the world community who are likely to have a significant impact on the way the nation-state operates and the way we establish rules with regard to the set of issues noted above. It should also be noted that the five problem areas mentioned above are interrelated, and that there are tradeoffs among them for various regions of the world. Moreover, as we begin to develop a conceptual framework for dealing with these problems, we will discover that we are and will in fact be dealing increasingly with institutional forms of government.

Here I should like to express what is more than a prejudice or idle speculation on my part, but which I shall not bother to attempt to demonstrate in full now. In my judgment, based on my study of the matters which I have just been outlining, it is no longer a question of whether we will have world government by the year 2000. The only questions left are how it will come into being, and whether it will be benign or totalitarian.

It has become increasingly apparent that the concentration of power that is now taking place in the economic, technological, and scientific centers of the world is carrying us forward in that direction. It is time therefore that those of us who believe in democratic processes begin to think of how the peoples of the world will be given an opportunity to participate in the development of world government institutions.

Turning to the United Nations, I would say that for the next five years one should not expect much from the five major powers by way of utilizing the organization, let alone the establishment of that world government. This may seem contradictory to the thesis of world government, but my prediction would be that the present trend is that the five major powers will not agree on a centralized system for about a decade, and that this consensus or agreement among them will emerge by and large outside the framework of the United Nations. For the time being, none of the major powers is presently pursuing policies at the United Nations which might foreclose any of their options in regard to what they consider their vital interests. This has been made perfectly clear by the United States, which is probably one of the most retrograde of the major powers in the United Nations in terms of advancing centralized authority. Furthermore, neither the People's Republic of China nor the other permanent members of the Security Council has shown any indication of a desire to participate in a drastic change in the authority of the United Nations. It is likely, however, that the smaller and medium size states

will begin to use the United Nations as a forum for accommodatory processes which will help establish institutional and organizational forms that will move the global political community to the development of a more rational, more humane, and more compassionate central system.

There are two or three areas, however, where it is sensible for those of us who are concerned with establishing appropriate institutions, to put in a great deal of effort within the UN framework. The first is the forthcoming conference on the Law of the Sea in 1974, which in my judgment, should become a central political mobilization activity in terms of world order values. Here we have the opportunity of establishing the doctrine of the common heritage of mankind, and the development of an ocean regime geared to world order value realization would indeed be a dramatic and significant progressive step. Similarly, now that we have established a global environmental institution, we should organize ourselves to put teeth into it, find monies for it, and give the staff strong support. In this connection those of us from the developed world must work for the kind of tradeoff that will provide the underdeveloped world with developmental opportunities along with environmental control standards.

Another area that it would be sensible for us to engage in is what I would call the humanitarian aspects of the global community system, and here I would point to three. First, we have been remiss in our support of the World Health Organization. The fact that the average black man in Africa has a life expectancy of 44 years, while the average life expectancy of the peoples of the northern hemisphere is somewhere between 68 and 72, seems to me intolerable, inequitable, and if I might say so, systematic murder. Such a condition should not be permitted to continue another decade. I should just point out that for the time being it is probably unrealistic to expect much aid from governments. We are likely to need massive help from both professional organizations—doctors, nurses, para-professionals, volunteer organizations—and a kind of political mobilization that will galvanize social movements around the theme of increasing life expectancies in the underdeveloped areas of the world.

Secondly, I think that the world community must take seriously the attitudes of the Africans in the United Nations towards those two South African regimes which practice apartheid and discrimination based on race as a matter of national policy. Since I consider those regimes, and here I put the matter in precise legal terminology, criminal regimes, I believe the world community has been remiss in its duty in its failure to intervene more directly.

Thirdly, our prevailing traditional notion of the domestic jurisdiction of states has permitted five great civil wars to take place—Indonesia, Bangladesh, Somaliland, Nigeria, and Biafra. We have sat idly by watching anywhere from 250,000 to a million and a half people being massacred by each other on the notion that we could not intervene within the domestic jurisdiction of a state. It seems to me that some sensible humanitarian intervention from the United Nations is what we need.

Finally, since there will be no leadership from the major powers in the United Nations, the medium and small powers, as well as individuals and volunteer associations, must begin to take quite seriously the development of the institutional forms needed to solve these problems.

* * *

Mr. KAPLAN remarked that the United States did not want the Chinese in the SALT talks for a very simple reason: it would poison our relations with China because the negotiations would be used as a club to keep China from developing a bigger force. That is why the Chinese have no desire to enter into these talks and why they are bitterly denouncing them. This raises the question whether any serious reduction of armaments is possible. The Russians have made it quite clear that the fear of a Chinese nuclear force has been an impediment to agreement on arms limitation. Similarly, the American nuclear umbrella is becoming leaky, as the Japanese are well aware. The Japanese, nevertheless, do not want to go nuclear now because of their existing economy and technology. The force they could build today would not have the range to hit Moscow and Leningrad. With a nation as diversified as China, about 500 targets would have to be hit and Japan cannot put together that kind of force. The force would be useful only against the United States, and the Japanese do not think it is worth the money to build a force that would hit American cities. That may well change in the 1980's for a large number of reasons, but whether the Japanese will be nuclear in the 1980's will depend in large measure on what the Chinese are doing.

We have one thing going for us, Mr. KAPLAN suggested, and that is the growing sense of interlinkages. These interlinkages reduce potential violence and increase the incentive for each of the major world powers to reduce violence. We need to learn how to work on these interlinkages and develop them if we are to get an effective set of normative rules not for the elimination, but for the control of violence.

Mr. OSGOOD remarked on the importance of realizing that arms control is a complement to political detente; it is not a dependent variable and therefore it only serves its purpose when there is a basis of political agreement among the signatories to the arms agreement. The reason why at one period of history we could not get arms control agreements with the Soviet Union but in the more recent period we can is fairly obvious: a fundamental change in the political relationship, as well as in the military balance, between the United States and the Soviet Union has taken place. Among other things we have acknowledged a situation of global strategic parity in which we expect the Soviet Union to project its influence in various ways to parts of the world where it has not been very influential before. What, however, is the political and military basis for an arms control agreement with China? Are we going to grant to China the same kind of parity? That is not likely. Nor is China in the position to claim such parity.

Mr. OSGOOD then expressed his doubts about the stability of the present structure of power for the next ten or twenty years, and in particular of the capacity of the United States and the Soviet Union to satisfy not only their allies but many other countries that their hegemony in military security affairs is the soundest basis for international order. If then, the basis of the present international order should begin to break down, would it be necessarily catastrophic to see the emergence of new centers of military power? It would be if there were pressures for the emergence of new centers of military power simply to re-assert the U.S.-Soviet hegemony. That would have exactly the wrong effect. If there were new centers of military power, they would have to be Japan and Western Europe. However unlikely it is that the Western Europeans could or would want to form such a new center of military power, it is not so unlikely that the Japanese might. It would not necessarily be the end of international order if Japan were to follow the route of the United States, the Soviet Union, France, and the United Kingdom. We may work ourselves unnecessarily into not only a policy box, but a conceptual box, by imagining that a world of proliferation is going to fulfill our worst visions of a world catastrophe.

The CHAIRMAN recalled the recent experience of China, a nuclear power on a considerable scale, having to turn to the United States by way of rapprochement in response to the massive and growing threat made manifest by the Soviet deployment of troops in Siberia and concentrations further South. He suggested that this pattern of rapprochement will survive even when China achieves a second strike capability, which it may already have. The reason for this hypothesis is that it is almost unthinkable that the nuclear weapon will be used. It is the conventional military threat from the Soviet Union that has forced China into its new relationship with the United States, which in many ways is parallel to that of Japan and Western Europe.

With regard to Mr. Kaplan's remarks, Mr. SCOVILLE agreed that we do not want the Chinese in SALT but he disagreed with the reasons stated. Chinese participation in SALT would not poison our relations with them but it would prevent any meaningful achievement between ourselves and the Soviet Union. The Chinese are not about to agree to any limitation of their nuclear force until they are at least secure in their knowledge that they have an effective deterrent against American or Soviet nuclear attack or threat. On the question of a first strike capability, Mr. SCOVILLE was not really convinced that the Russians were trying to maintain a first strike capability against the Chinese. One of the dangers of a first strike capability, the Soviets may realize, is that it increases the risk that nuclear war will occur, because the other state is forced to fire all its retaliatory capability when it sees a missile coming toward it.

Commenting on an earlier statement by one of the participants that the present system is unsatisfactory, Mr. MENDLOVITZ observed that perhaps it is the best one can achieve under the circumstances. He

found it a peculiar sort of rhetoric, nevertheless, because it seemed to him that it is a mad world that spends 208 billion dollars a year on armaments. We should, he suggested, work for a better system. A presidential candidate who says he will cut back 20-30 billion dollars a year on arms production may be more significant and important than SALT will ever be in the long run. He expressed dismay at the transfer of small arms to the Third World by the Big Powers. We need, he urged, to engage our Third World counterparts in a serious discussion on why it would not be more significant for them to have a security arrangement of a peacekeeping nature through a centralized authority, rather than continue building up their own armies.

The CHAIRMAN remarked that we all agree that it is a mad world, but the right remedy for improving it is another matter.

ALAN GERSON
Reporter

EXPULSION AND EXPATRIATION IN INTERNATIONAL LAW: THE RIGHT TO LEAVE, TO STAY, AND TO RETURN

The panel convened at 10:30 a.m. April 13, 1973, Rosalyn Higgins* presiding.

The CHAIRMAN emphasized the profound importance and interdependence of the rights to leave, stay, and return. She cautioned that, although the topic encompassed disparate cases—the exodus of Soviet Jewry, the claims of Palestinians, and the question of amnesty for draft dodgers—sterile debate on specific issues should be avoided. Rather a conceptual framework linking these separate cases should be sought.

REMARKS BY YASH P. GHAI**

I propose to discuss the topic through an examination of the practice in East Africa, especially as it relates to its Asian community. There is considerable confusion in the rules of international law on this topic. Few rules are above controversy and in many instances, the practice goes against what are alleged to be the rules. The answer in several instances depends on interrelated but separate issues, each of which might be controversial. Lack of clear answers is partly due to the great number of variables. Additionally, some of these variables are matters properly governed by international law; others by domestic law. Moreover, there is, generally speaking, a need for greater consensus among states on the scope of the variables before the set of rules can function effectively. Thus questions of nationality are central, but the

* Royal Institute of International Affairs.

** Former Dean of the Dar es-Salaam Law Faculty.

jurisdiction over them is domestic; problems of statelessness are controversial; the right to leave a country may depend on the right to enter another; the possibility of expelling a person is contingent on the obligation or the willingness of another country to receive him.

At the independence of the East African countries of Kenya, Uganda, and Tanzania, a number of considerations affecting the right to stay and the right to leave came up for resolution. Most of them arose in relation to members of the Asian and European immigrant communities. A great deal of the discussion turned on the point of citizenship. Until independence most of the residents of East Africa were British citizens or British protected persons, the distinction turning on the status of the country. In the colony of Kenya the residents were British citizens and in the other two countries, a protectorate and a trusteeship, the residents were British protected persons. It was assumed that the indigenous inhabitants would become citizens of the independent countries. As far as others were concerned, those who were born in the country and one of whose parents was also born there would automatically become citizens; the rest would be eligible to become citizens if they so applied within two years of independence.

The implications of citizenship were reasonably clearly understood. It was clear, for example, that those who did not become citizens might at some stage be asked to leave East Africa (although the Kenya constitution at independence had guaranteed noncitizen residents against expulsion). It was also understood that those who did not become citizens of an East African country but retained British citizenship would have the right to enter Britain. The 1962 British legislation restricting the rights of entry into Britain of Commonwealth citizens did not apply to British passport holders and thus exempted the East African Asians. It was also understood that those who did become citizens of a country in East Africa would have the right to stay and work in that country. It was clear that those who did not become citizens could not expect not to suffer discrimination in employment policies. People who had options as regards nationality made decisions on the basis of these understandings. The concept of citizenship was crucial in the determination of the rights to stay and to enter. An attempt was made to move away from racial criteria that had so dominated British policy and practice in its administration in East Africa and to move to constitutional and technical criteria of citizenship. A large number of Asians opted to become citizens of an East African country but the majority, at least in Kenya and Uganda, did not.

It is clear from the practice in East Africa that a number of these expectations have been frustrated. Most countries have embarked on policies which in some sense go against understandings at the time of independence. The most glaring instance, of course, is the expulsion of the Asian community from Uganda by General Amin. The Asians expelled from Uganda fell into various categories. A great number were British passport holders and a few were Indian citizens. An early order of Amin's also required the expulsion of Asians who were Ugandan citi-

zens, but this order was subsequently withdrawn under pressure from some Ugandan Africans who felt that it was important to maintain the integrity of the concept of citizenship. Nevertheless, the Amin government proceeded to revoke the citizenship of a large number of Asians who had become Ugandan citizens. Having thus been declared stateless, they were liable to expulsion. Zanzibar, which is now a part of the Republic of Tanzania, imposed a number of restrictions on the right of Asians to leave that island. In certain instances the right to leave is completely prohibited, while in others the right to leave is conditional on the payment of large fees. Kenya has expelled a certain number of its citizens, generally by first revoking their citizenship.

There has emerged a growing class of stateless people within East Africa. A number of Asians who were citizens of Zanzibar but moved away from the island during certain periods of time were declared no longer citizens of Zanzibar and hence, now are not citizens of the United Republic of Tanzania. The fact of Kenya's deprivation of citizenship of its deported citizens also has made them stateless and we have already referred to the statelessness of groups within Uganda. There has also been a certain amount of forced movement of persons within East Africa. Thus in 1960, Uganda expelled 40,000 black Kenyans who had been gainfully employed and residents of Uganda for many years. All three governments in East Africa have formulated and are implementing policies of Africanization of the public services as well as the private sector. These policies have resulted in the gradual expulsion of large numbers of noncitizen Asians.

A number of comments may be made on these developments before proceeding to an analysis of their significance from the point of view of international law. First of all, the practice of expulsions or forced movements of persons within Africa is not a purely racial matter. Uganda expelled black Kenyans before it expelled the Asians, and the expulsion from countries in West Africa and Zaire has involved, in almost all cases, black Africans. Most countries in Africa are under great political and economic pressures, and have problems in establishing viable political and economic systems. Acute tensions arise from unemployment; the leaders of a country feel primary responsibility to its own citizens, which they feel can only be discharged by the expulsion of its noncitizens.

Secondly, the countries in Africa, particularly those in East Africa, were left a difficult legacy by the colonial masters. The groups of persons in relation to whom questions of expulsion have arisen most acutely are those who were brought to these countries by the colonial powers for the purposes of colonial administration. Some of the present tensions arise from the failure of the colonial powers to resolve these problems before the dissolution of the empire. The colonial society was a racially exploitative one, in which the Europeans and Asians enjoyed preference over Africans, and in which the economy was dominated by alien groups. A policy of fair distribution would of necessity imply some restrictions on Asians and Europeans.

Thirdly, in relation specifically to East Africa, it can be argued that a very heavy responsibility rests with the British Government. As already mentioned, Asians who decided to retain British nationality did so on the basis of a clear understanding, acquiesced in by the British Government, that there would be an unrestricted right to enter into Britain. However, in 1968, when the governments in East Africa began to implement the expected policy of Africanization resulting in the immigration to Britain of many Asians, Britain passed legislation to restrict the rights of entry into Britain of its Asian citizens. Thus the problems became aggravated. If Britain had not introduced the restrictive legislation, a number of the noncitizen Asians would gradually have been able to leave East Africa. As it was, they were not able to leave and this created enormous tensions within East Africa. This also made the position of the Asians who had become citizens of East African countries extremely difficult. It was not only in this respect that Britain failed to live up to its obligations to its Asian citizens; in other aspects of its decolonization policy it had shown little regard for their fate. This is in contrast to the solicitude it showed for its white citizens in East Africa. All the white civil servants in East Africa were enabled to retire prematurely under a special scheme whereby they would make handsome financial gains. Proposals of a similar scheme for the Asian civil servants were rejected by the British Government.

Secondly, European farmers were enabled to sell their farms at high prices so that they could leave East Africa with the land being transferred to Africans. Proposals for a scheme to buy out Asian businesses were turned down by the British.

Thirdly, the British Government enacted special legislation as regarded citizenship which applied basically to white citizens only. This is the 1964 British Nationality Act (No. 2), which was meant to get around the East African laws prohibiting dual nationality. Under the British legislation, those who gave up British citizenship to become citizens of an East African country can at any time reclaim British nationality. Such persons then have superior rights to those Asian citizens who had always retained British nationality.

Many of the problems that have risen in East Africa can be regarded as those of decolonization and they all stem from Britain's unwillingness to discharge the obligations it incurred at the time of the establishment of the empire. Governments in East Africa have been saddled with problems that really belong to Britain. The fairness of holding these governments to rigid international standards of nonracial treatment in the face of Britain's behavior may well be questioned.

As to the significance of East African practice for international law, first it is clear that East Africa does not accept the principle of a vested right of residence or rights to carry on a business or profession. Many of the Asians who have been expelled have been residents in East Africa for years, if not actually born there, and it has not been argued that this has vested in them any right to stay on. No foreign governments,

not even the governments of the nationals expelled, have questioned the right of the East African governments to expel them. Until the Uganda expulsions, however, there were no mass expulsions and it may be argued that mass expulsions pose a different set of problems from the expulsion of individuals. But there has been no real question of the wide powers to expel noncitizens.

Secondly, the rule that there is no right to expel citizens is generally accepted. In this respect it is significant that even Amin felt compelled to withdraw his order against the Uganda-Asian citizens, and that when Kenya, for example, has wished to deport a citizen it has first deprived him of his Kenyan citizenship.

Thirdly, in East Africa the principle of the right of entry of citizens is clearly recognized. As far as the British position is concerned, it can be stated that there is no automatic right of entry for its citizens. The British position is that, while there may be a right of entry, it can be subjected to various conditions. The most the British have accepted is that it may have an obligation to accept those citizens expelled by another country. For example, if a country expels a British citizen, the British would have to accept him. But British practice has made clear that this is not an obligation it owes to the citizens but to the other state. It is likely that Britain has used this interpretation to make deals with governments in East Africa whereby those governments do not expel British citizens, even though they are denied the right to work and are unemployed. Such persons cannot, therefore, claim the right to enter Britain. Britain has also sought to introduce factors additional to citizenship as entitling one to enter the country. The notion of a substantive link introduced through the concept of a *patrial* is a novel development. Although sometimes justified on the basis of the *Nottebohm* case, it is difficult to see how that case supports the British position.

Fourthly, the practice in East Africa has shown that there is no real protection against deprivation of citizenship and therefore the emergence of a class of stateless persons. The domestic legislation of these countries prohibits governments from depriving a citizen of citizenship acquired through birth. In relation to those who were registered or naturalized (a category which includes the bulk of the Asian community), however, the governments can take away such citizenship without giving any reasons and there appears to be no mechanism of review or appeal. There is no doubt that practice in East Africa goes against the Convention on the Elimination of Statelessness.

Finally, the British law in practice introduces a racially discriminating factor in immigration legislation. Even though the British legislation is not based explicitly on racial criteria, its effect nevertheless is to introduce the racial factor in practice. In this sense, the British legislation contravenes various UN declarations and conventions on racial discrimination. It was in fact the actions of the British Government which have for the first time introduced racial discrimination in legislation about citizenship and immigration and, if the laws and the practice in

East Africa have shown a similar tendency, they are in one sense a reaction to the British initiatives. In that sense, Britain has done a great disservice to the cause of the progressive development of international law.

REMARKS BY LUNG-CHU CHEN*

This discussion on "Expulsion and Expatriation in International Law" is very timely indeed. Today we are witnessing a new type of people "in orbit," not astronauts but "refugees in orbit." In a recent bulletin, the UN High Commissioner for Refugees vividly describes how a typical refugee in orbit wandered from country to country over the past half year in quest of some one country that might let him in and stay. What made the case dramatic was that during that long period the refugee was shuffled from airplane to airplane, and confined in airports. Compelled to leave the country of residence and lacking proper identity and travel documents, many people cannot disembark legally anywhere. In earlier times there was always the possibility of jumping ship. But today, under the closed national boundary system policed by more sophisticated entry and exit control, such unfortunate persons are condemned to a nightmarish cycle of enforced airplane journeys and periods of practical imprisonment in airport waiting rooms.

Although my focus will be on the right to return, it needs to be underlined that the right to return is closely related to the other two rights (the right to leave and to stay), and it is a major component of the overall problem of freedom of movement for people across national boundaries. Claims to "return" to a territorial community are, thus, part of a more general claim of access to a territorial community, either for temporary or permanent purposes, by both members and nonmembers of that community. "Return" implies that people seeking entry to a particular territorial community view that community as a "homeland," as a "state of origin." Hence the focus here is somewhat narrower than the general claims of access to territory. These people seek return to the territorial community of which they are still or were once members (nationals or long-term residents), or of which their ancestors were members. The people with whom we are concerned have some distinctive link in the sense of actual and significant ties with that community.

Claims for return to a territorial community are put forward either on an individual basis or as a group claim. Individual claims are relatively easy to handle. Group claims for return to a particular territory are more complex, for these claims are often intertwined with the legal doctrines concerning self-determination, state succession, and so on. Group claims for the right of return arise in a variety of circumstances. Here are some notable examples:

In Europe: Europeans displaced by World War II, particularly because of the delimitation of new national boundaries, seeking to return to their homelands.

* Yale Law School.

In Asia: Arab refugees seeking to return to Palestine; Jews in the Arab countries, the Soviet Union, and elsewhere seeking to return to Israel; Pakistanis seeking to return to Pakistan from Bangladesh; Bengalis in Pakistan seeking to return to Bangladesh; Chinese refugees in Hong Kong; Nationalist Chinese in Taiwan seeking to recover and return to Mainland China; Taiwanese abroad seeking to return to Taiwan; and the refugees on both sides of Vietnam and of Korea seeking to return to their homes.

In Africa: Sudanese refugees seeking to return to Sudan; expelled Asians in East Africa seeking entry into Great Britain, India, or Pakistan; Biafrans seeking to return to Nigeria; and freedom fighters seeking to return to Southern Africa and the Portuguese controlled territories.

In the Americas: U.S. draft dodgers and deserters seeking to return to the United States; Cuban refugees seeking to free Cuba and return to Cuba; and Haitians seeking to return to their own land.

Some of today's most pressing claims to return concern populations displaced by wars (external and internal), revolutions, political upheavals and oppression, conquest, decolonization, partition, or the change of status of a territory. Thus the 20th century has been called the century of homeless people, the century of refugees who seek freedom from violence and political persecution by moving from land to land.

Apart from these dramatic crisis situations, there are countless instances in which people move and claim to reenter their own homelands. They are impelled to move for many reasons having no relation to immediate crises. It is part of the ongoing process of transnational interaction in which people move across national boundaries to pursue values of all kinds in this world of ever-increasing interdependence and ever-increasing mobility.

While the nation-state is still the predominant participant in the world arena, other participants, particularly individual human beings, are becoming more assertive. In the name of human dignity and human rights, individuals demand maximum freedom of movement, both internally and transnationally. They demand in particular the freedom to return to the territorial community with which they believe they have significant ties, and to return under conditions of respect for human dignity and human rights. Assurance of personal safety and freedom are vital: they do not seek to return to their homeland only to be persecuted. In the face of the increasing assertiveness of the individual, nation-state elites strive to maintain and exercise their traditional competence to control and regulate the flow of people, in addition to controlling the flow of goods and ideas. The primary concern of nation-state elites is, of course, to control people in relation to resources as a base of national power. Hence the underlying question is how to harmonize the individual's freedom of movement with the necessity of the nation-state to regulate and control people because of its security, development, absorbing capacity, or other considerations, with due regard to the value consequences beyond the claimants immediately involved.

The policy which most of us as scholarly observers would recommend is progress toward a nonsegregated world of human dignity in which people, resources, and ideas can move freely so as to achieve optimum shaping and sharing of all values, and in which the present disparities in the distribution of people in relation to resources could eventually be redressed equitably around the globe. We favor the utmost freedom for the individual in the choice of place to live, work, enjoy, and retire. Hence, apart from general freedom of movement, a particularly strong presumption is for freedom to return to the territorial community with which one has significant ties. Every body politic should be perfectly willing to have people of different cultures and perspectives return. Indeed, given the present configuration of the world constitutive process, the community against which the individual can claim some significant ties should be made to bear primary responsibility for affording him the opportunities of life. But we repudiate coerced return. Freedom to return implies that an individual should not be made to return to his land without his consent, whether he is a refugee or not.

As policies, like legal doctrines, operate in pairs of complementarity, the presumption for freedom to return needs to be balanced by other public order considerations—the maintenance of security, health, morals, development, and so on for the particular community, taking into account also the impact on neighboring and other states, the regional community, and the world community.

In deference to contemporary emphasis upon human rights, when the individual's claim to return is challenged by the state, the burden of proof should rest on the state seeking to establish the necessity for restrictions on return (in terms of security and other public order considerations) and the appropriateness of its measures by reference to the authorized legal procedure. Similarly, the measures taken by the state should be required to be temporary in nature (only to the extent necessary), and not to be contrary to contemporary peremptory norms (*jus cogens*). The state should not, further, be permitted to take arbitrary measures, such as denationalization (deprivation of nationality), complex reentry requirements or exactions of outrageous fees, to deny the individual's freedom to return. Finally, the decision of the nation-state in restricting the individual's freedom of return should be subject to review by inclusive decisionmakers of the world community.

In relating these recommended policies to alternative consequences of one choice or another, it is vital that all relevant factors in a given situation be appraised contextually, with the significance of each being made a function of its relation to all the others.

In earlier times when national boundaries were relatively open, transnational interaction was less frequent, and means of transportation and communication were relatively underdeveloped, the question concerning freedom of transnational movement was of minor consequence. Furthermore, as international law was regarded as concerned "exclusively" with nation-states, it was often indifferent to the fate of the

individual. The whole problem of movement for people was approached not from the perspective of the protection of human rights of the individual, but from the paramount consideration of protecting and consolidating the bases of power of states, control over people being a principal source of power bases. Hence customary international law recognized the exclusive competence of the nation-state to control and regulate people for entry into its territory, a manifestation of what was said to be "sovereignty" of the state.

The growing contemporary concern for the protection of human beings, as symbolized by global and regional human rights programs, is challenging the traditional exclusive competence of the nation-state to regiment people and to regulate their movement. As state power is deemphasized, people's power is stressed. Concern for the right of return is an expression of the increasing general concern for the protection and fulfillment of human rights. Thus specific new prescriptions have developed in regard to the right to return.

The Universal Declaration of Human Rights proclaims in its Article 13 (para. 2) that "Everyone has the right . . . to return to his country" (Art. 13, para. 2). The International Covenant on Civil and Political Rights puts it this way: "No one shall be arbitrarily deprived of the right to enter his own country" (Art. 12, para. 4). On the regional level, the European Convention on Human Rights states that: "No one shall be deprived of the right to enter the territory of the state of which he is a national" (4th Protocol, Art. 3, para. 2). The American Convention on Human Rights also affirms that no one may be deprived of the right to enter the territory of the state of which he is a national (Art. 22, para. 5). These provisions, although phrased in general terms, are unequivocal in affirming community expectations about the right of return insofar as nationals are concerned. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination further stresses nondiscrimination in the exercise of this right.

To highlight the basic unity of mankind in freedom of movement, the Uppsala colloquium was convened in June 1972 to formulate detailed principles for guiding and facilitating the liberal application of the freedom to leave and to return. Aside from reaffirming the general freedom of a national to return to his country, the Uppsala Declaration sought to fortify the right to return in these terms:

No person shall be deprived of his nationality for the purpose of divesting him of the right to return to his country (Art. 10).

No person shall be required as a condition of the exercise of the right to return to his country of nationality to pay exorbitant fees, special taxes or similar exactions (Art. 11).

The re-entry of long-term residents who are not nationals, including stateless persons, may be refused only in the most exceptional circumstances (Art. 12).

Under customary international law it is of course generally accepted that a body politic has the competence to set limitations on the admission

of aliens to its territory, either for temporary or permanent purposes. The actual exercise of this competence is restrained by treaty, comity, and the practical need of interactions with people of other communities. This continues to be the prevailing practice today, as evidenced by the omission of any stipulation of the right of access of non-nationals to a territorial community in any of the human rights conventions mentioned above. The prime exception is to allow long-term residents (non-nationals) to return to the land of domicile. (Some scholars have justified this on the theory of "acquired rights.") On the other hand, it is equally well established that nationals shall not be denied the right of entry into their own country, as seen in customary international law and recent human rights prescriptions.

The general right of nationals to return to their own country, however, is hampered and frustrated by various practical limitations and pretexts:

- (1) Claimants are subjected to onerous burdens in proving their nationality;
- (2) Some nation-states use decrees of denationalization to deny the right of entry of their own nationals;
- (3) Cumbersome requirements for obtaining passports or reentry permits are made applicable to nationals;
- (4) Excessive fees for return are imposed;
- (5) Certain people are classified as a special category of nationals whose right to entry is curtailed;
- (6) Persecution or the threat of persecution is used to prevent and deter refugees from returning to their land of origin.

With regard to refugees, the principle of nonrefoulement has become well established in international law. According to the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees and other related instruments, refugees shall not be returned against their will to the land of origin where they are in danger of political persecution. Meanwhile, efforts have been made to establish the right of voluntary repatriation for refugees, as symbolized by Article 5 of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969. This article reads in part as follows:

1. The essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will.
2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations

The present state of practice concerning the individual's freedom of movement and return leaves much to be desired. Pending the achievement of a world commonwealth of free men in which people can move freely from land to land as independent human beings, the right to return to a territorial community should be extended from nationals to all other persons who have significant ties with that particular community.

One way to check the arbitrary exercise of power of exclusion by the nation-state is to make it bear the primary burden in justifying its decision on exclusion and to subject its decisions to review by an international agency empowered with adequate authority and control. In the most ideal world, the international agency would further be empowered to make certain that the individual choosing to exercise his right of return could do so with security in the enjoyment of all human rights.

When freedom of movement becomes a reality, when people are free to reenter where they came from and to choose the place to live, work, enjoy, and retire, we may bid farewell to "the century of homeless people," and help usher in a century of human dignity.

REMARKS BY VALERIE CHALIDZE*

"Everyone has the right to leave any country, including his own"—this can be considered the basic philosophical principle of social relations just because it asserts the right of *everyone* to leave the territory of any state and therefore to escape the jurisdiction of any state. Although conditions in the world must change substantially for this principle to be always practicable, the import of its proclamation is the recognition that state sovereignty over the individual can be limited in the future.

In the Universal Declaration of Human Rights this principle is affirmed without reference to limitations. The Covenant on Civil and Political Rights does contain reservations and thereby tries to reconcile the ideal principle with the real state of the world. But the restrictions imposed on this right in the Covenant can be interpreted as loosely as one pleases, and the legislation or practice of different states can limit still more the right to leave the country. Thus it is important to formulate principles concerning the minimum restrictions governing this right which are compatible with reality but which also emphasize that a state's right to restrict freedom to leave the country cannot be interpreted in certain cases as a right in practice to deny an individual this freedom.

The only question should be: Has any country agreed to admit the person concerned? In practical terms, this is a natural limitation on the freedom under discussion. However, unless under treaty obligation to provide lawful assistance to other states in this sphere, a state should not make a guarantee that a person will be admitted to the country of destination a prerequisite for permission to depart. (This requirement exists in the Soviet Union but is not based on statute.) Even if all states should agree to such mutual assistance, the right to leave a country should not depend on an entry visa to any country. It is important to recall in

* Co-Founder, Soviet Committee on Human Rights.

this connection the evident right of everyone to use of that space which is not under the jurisdiction of any country, and in particular to use of the open sea. In practical terms these questions are not now urgent, but that is no reason to consider them unimportant in principle.

The right of convicted persons and persons under investigation to leave a country: When I discussed aspects of this question in my report to the Uppsala Conference on the Right to Leave, I asserted that if criminal punishment is considered a means of social defense rather than revenge for an act committed, then the right of a convicted person to leave a country should be recognized, if that person does not want to live in the society whose interests are protected by the state which condemned him. Clearly emigration of persons who have committed actions considered criminal by generally accepted standards will not be encouraged by other states; recognition of the right of convicted persons to leave a country will, in practice, affect individuals who have committed acts not criminally punishable in all countries. Acknowledgment of this right, even if partial, can be important for the protection of persons against political persecution. Of course, special agreements or unilateral decisions can make provision for appropriate exceptions in case of misuse of this right or in case of its utilization in interstate conflicts, especially where international terrorism is involved.

Considered recognition of the right of convicted persons to leave a country would be in keeping with the general principle stated at the beginning of these remarks. This principle seems unrealistic in practical terms but perhaps it can be implemented in certain cases, namely in those instances when political persecution seriously damages the prestige of a country. With particular regard to the USSR, its leaders might seek to restore some Soviet prestige by offering the right of departure to at least some political prisoners (especially those convicted in connection with attempts to leave the USSR). From Soviet juridical practice to date, we know of only a few cases where the right of convicted foreigners to leave the country was recognized and one case where an exit permit for Israel was issued to an individual sentenced to correctional labor without deprivation of freedom (the Shapiro case). It is not known whether this exit permit was granted through a special procedure or through an oversight.

The right of those under investigation to leave a country evidently cannot be affirmed in general, as participation in judicial proceedings of reasonable duration may be regarded as one of the formalities necessary prior to receipt of permission for departure. In one case from Soviet practice, an application for an exit visa was refused to a person declared under suspicion by the procurator more than six months before (the Myuge case).

Although the principle under consideration seems quite unrealistic in general, in concrete cases this approach does not seem strange. For instance, Israel is ready to admit persons convicted in the USSR in connection with their desire to go to Israel; Leyden University invited Bukovsky after his conviction in the USSR to continue his studies in

the Netherlands; and the University of Leeds invited the mathematician Shikhanovich, who is under investigation, to deliver lectures in England.

The right of convicted persons and persons under investigation to remain in their country: I know of no violations of this right in Soviet practice. In theory, former Soviet criminal legislation did not recognize this right for persons convicted and sentenced to exile after having been proclaimed enemies of the workers, but it appears that such sentences were not imposed in practice. In those countries where exile exists as a measure of punishment, the right of a convicted person to remain in his country is not violated if the convicted person enjoys a free choice between exile and some other form of punishment.

The right of convicted persons and persons under investigation to return to their country: The meaning of the words "their country" as relevant to the problem of return is very uncertain. It is possible to maintain that the right of a Soviet citizen to return is guaranteed by the acknowledgment of the freedom to choose one's place of residence. In practice, the right to return is not ordinarily violated with respect to persons whom the authorities consider Soviet citizens. Other individuals who consider the USSR their country can experience serious difficulties in realizing the right to return. The right to return is not apparently violated with respect to Soviet citizens who are under investigation or who have been convicted, but a special problem exists in that these persons may not know that they are returning as suspects or convicted individuals. After the war this question affected thousands of persons liberated from German prison camps by allied armies. On their return to the USSR, they were usually sentenced to deprivation of freedom for surrendering to the Germans. (The average sentence given was ten years.) Now this uncertainty affects those who return after departure from the USSR in violation of officially established procedure or after an earlier refusal to return. Usually punishment under the articles of the criminal code on treason awaits such individuals, with the rare exceptions of those instances where the authorities conclude that the case has no political significance; then the person is held responsible only for illegal departure or flight from the USSR or is entirely freed from liability. For example, the physicist Sayasov remained abroad for personal reasons but soon returned. He was not tried, but public censure was so severe that he could not find work for several years. Punishment in some cases may be death, but the average penalty imposed is 10 years deprivation of liberty. There is no problem involving freedom to return to the USSR for such individuals if they surrender to the Soviet Union as criminals (for instance the case of Strolman who had sought asylum in Yugoslavia; the case of Kudirka who, after asking asylum in America, was returned to Soviet control by the United States). In cases of voluntary return such "defectors" as a rule suffer no limitation of their right to enter the USSR, but on arrival certainly those who have asked political asylum are punished. There are many such cases (for example, the case of the artist Nakashidze). The individuals involved do not know when they return if they are under investigation or have

been convicted since a criminal case is apparently always initiated, but the investigation may be suspended or a court may hear the case in their absence. (Proceedings in the absence of the defendant are permitted in such cases by Article 246 of the Criminal Procedural Code of the RSFSR.) So far as I know, neither the subject of investigation nor his representatives in the USSR are ordinarily informed about the beginning of an investigation or about court proceedings. On one occasion I did learn through documentary evidence that such a case had been initiated and then suspended (the case of Levin, now a resident of the United States). Even confirmation of the confiscation of property, which is sanctioned by the criminal code in cases involving treason, is not conclusive evidence of a court sentence, since the law also provides for administrative confiscation of property of persons "defecting" abroad for political reasons. (Summary Law on Requisition and Confiscation of Property, 1928).

I consider this question quite important not only because the possibility of exercising a right can be decisive for an individual but also because of the conditions governing his exercise of this right and the possible consequences of this action.

Since court proceedings in the absence of the defendant are possible in these cases, since the law sanctions capital punishment for treason, since no published Soviet law regulates the execution of death sentences, theoretically it is interesting to speculate on the likelihood of the execution of such in absentia death sentences outside Soviet territory. This topic has direct relevance to the right to return to one's country. However, I shall refrain from discussing this question here since I lack reliable information.

Although plainly one cannot hope to secure freedom to leave a country for convicted citizens before this freedom is achieved for other citizens, discussion of this topic is important not only for the theoretical elaboration of the principle that everyone has the right to leave a country but, hopefully, also for possible realization of this right in specific individual cases.

COMMENTS BY HUSSEIN A. HASSOUNA*

Mr. Ghai has put the problem of expulsion of the British nationals of Asian origin from Uganda in its right perspective: It must be looked at not as a *sui generis* but as an example of the policy of Africanization being carried out in the whole of Africa. That policy is in conformity with the many UN resolutions adopted by the General Assembly since 1962, on the right of states to permanent sovereignty over all their natural resources.

The measures of expulsion were in accordance with international law which allows each state to expel aliens from its territory. The Government of Uganda provided for compensation; and the expulsion

* Permanent Mission of Egypt to the United Nations.

was carried out peacefully. Nor do these measures constitute any violation under the relevant provisions of the various international instruments of human rights: *e.g.*, Article 1(2) of the International Convention on the Elimination of All Forms of Racial Discrimination; Article 2(3) of the International Covenant on Economic, Social and Cultural Rights; and Article 13 of the International Covenant on Civil and Political Rights.

The right to leave a country is certainly an important right but the importance attached to it is by no means universal. This reflects a basic difference of approach in which the Western countries emphasize political and civil rights, while the non-Western countries and all developing countries emphasize economic and social rights which, in their view, are essential for the exercise of political and civil rights. It follows from this basic difference of approach that whereas in Western opinion the right to leave should be absolute and unqualified, most developing countries see it subject to limitations and qualifications. Indeed, to open the door for unrestricted emigration would run counter to the vital interests of any developing society. With this consideration in mind, the General Assembly, in its recent resolution on the outflow of trained personnel from developing to developed countries, called for the drafting of guidelines for a program of action indicating viable measures that can be taken to deal with the problem, and, above all, practical and effective guidelines to be followed, mainly by the governments of industrial countries, to put an end to that process and reverse it.

Limitations on the right to leave may also be found in the various international instruments on human rights. In order to define the right to leave correctly and determine its scope, the relevant provisions of the international instruments must be read as a whole: Thus Article 13 of the Universal Declaration on Human Rights must be read in conjunction with Article 29 and Article 12(3) of the International Covenant on Civil and Political Rights.

Turning to Mr. Chalidze's statement that a state should not be allowed to make permission for a person to depart dependent upon a guarantee that a person will be admitted to the country of destination, it seems to me that such a prerequisite by a state would be in conformity with its duty of protection over its citizens. Also, it would tend to prevent cases of statelessness.

Moreover the right to leave a country cannot be fully exercised unless there is a right of entry into another country. If there is an obligation upon a state to let everyone leave it, there must be a corresponding obligation on other states to let people enter it without discrimination. Barriers imposed by states on entry, such as quota systems or racial and religious requirements, must be lifted.

Mr. Chalidze further stated that the right of a convicted person to leave a country should be recognized, if that person does not want to live in the society whose interests are protected by the state which condemned him. It seems to me that this claim looks at criminal punishment as a means of social defense, but overlooks completely the essential deterrent effect of criminal punishment in a given society. Moreover,

it denies that an individual has not only rights but also duties and responsibilities, a major one being to abide by existing laws. Opposition to such laws should not be expressed by violating them but rather by either trying to change them or, failing this, moving to another country where different laws prevail.

With respect to the right to return, I agree that Mr. Chen has put the problem in the right perspective in referring to the closed national boundary system of today which impedes the freedom of movement of people in general. However, in referring to different group claims for the right of return, the speaker gave among his examples the Jews in the Arab countries, the Soviet Union, and elsewhere, seeking to return to Israel. To portray the problem of those Jews this way as seeking *return* to Israel is completely incorrect, since what they are really seeking is to *settle* in a country in which they were neither born nor ever lived.

As to the Arab refugees seeking to return to Palestine, I wish to emphasize that, since the establishment of the new international legal order following World War II, there has never been a more striking case where the right of return of a people has been, on the one hand, continuously upheld and reaffirmed by the international community, while on the other hand, consistently denied by a state.

International recognition of the right of return of the Palestinians, first expressed by the UN General Assembly in 1948, has been reaffirmed year after year in various resolutions. Although these resolutions may be considered, from a technical point of view, mere recommendations, their adoption over the past twenty-five years by an overwhelming majority of UN members, endows them with considerable authority and weight.

To conclude, all relevant international instruments on human rights refer to both the right to leave and the right to return. In my opinion, not only should the right of return be put on an equal footing with the right to leave, but the former should even take precedence and acquire priority over the latter. The reason for this being that the right of return, unlike the right to leave, is invoked in most cases by those who have been subject to two violations: violation of their right to stay in their country when they are illegally expelled therefrom, and violation of their right to go back to their country.

COMMENTS BY SIDNEY LISKOFKY*

The proposals of Mr. Chalidze and Mr. Chen are intriguing, but I would characterize their innovations as on the "frontier" at this time. Mr. Chalidze proposed the option of exile, in effect, as an alternate form of punishment for both political and common crimes—though, he considered, in practical terms the option would be available only to persons convicted for political acts. Many questions come to mind regarding this proposal, such as the uncertainty of the distinction between

* American Jewish Committee.

political and common crimes, and whether governments might not use the option to impose increasingly severe penalties so as to drive political dissenters into exile. However, I think it more urgent for the present discussion to concentrate on the right to leave as it applies to the ordinary citizen who has not been prosecuted or convicted for illegal acts, political or other, but who wishes to begin his life anew in another country for whatever reason.

As to Mr. Chen's proposal, while it is surely an ideal worth striving for, I wonder how one could translate it into a workable norm of universal applicability. A proposal along similar lines was found impractical at last June's Uppsala Colloquium on the Right to Leave and Return. The farthest the experts at that Colloquium were able to go beyond the existing international law standard, which limits the right to return to nationals, was to extend it to non-nationals, including stateless persons, other than in the most exceptional circumstances. This corresponded to the standard suggested at a conference of legal experts on freedom of movement, sponsored by the International Commission of Jurists in 1968 in Bangalore, India.

I shall focus my remaining remarks on the right to leave, in respect to which it might be of interest to contrast the tenor and content of two recent international convocations—the nongovernmental Uppsala Colloquium and the intergovernmental UN Commission on Human Rights. The contrast provides a glimpse of how political reality measures up to the ideals which the panelists and other independent experts and civic groups espoused.

The participants at Uppsala elaborated on the draft principles in the 1963 Inglés study of Article 13(2) of the Universal Declaration, which principles the United Nations had "placed on ice" for a decade. The declaration adopted at Uppsala reaffirmed Article 13(2) and called on all states to recognize and implement it. It focused particularly on the various forms of coercion, official and unofficial, used by governments to inhibit the exercise of the right, including renunciation or direct revocation of nationality; penalties and harassment; special fees and taxes; burdensome documentation and other formalities; and unreasonable application of national security and other limitations on the right permitted in the Universal Declaration and Covenant on Civil and Political Rights. It proposed a clear and present danger qualification for the national security limitation and took a forthright libertarian view on the brain drain consideration (which presumably comes within the Universal Declaration's general welfare limitation). It emphasized the right of appeal and petition on both the national and international levels.

Article 13(2), as spelled out in the Inglés draft principles, came up at long last for discussion at the Human Rights Commission in Geneva several weeks ago. The comparison with Uppsala was less than inspiring. Though the resolution adopted by the Commission "affirmed the importance" of the right in the article, it merely drew the draft principles to the attention of governments and other institutions, carefully avoiding language suggestive of approval; in contrast the Commission expressed

its "hope" that states would "take into account" other sets of draft principles spelling out particular rights, adopted at the same session. The resolution also omitted any reference, express or implied, such as contained in the other resolutions, to the goal of an international instrument spelling out the right to leave and return. Most important, the Commission deleted from a prior draft of the resolution a routine closing paragraph retaining the subject on the agenda, despite a strong plea from the Italian and Austrian delegates to retain it. The Soviet delegate applauded this deletion as substantiating his government's view that the right to leave a country was not a fundamental right.

Fortunately, the negative impact of the Commission's resolution was partially reversed when, on May 11, it came up for review in the Social Committee of the Economic and Social Council. Italy, joined by Denmark, Sweden, and Trinidad-Tobago, offered an amendment to the Commission resolution by which it would retain the subject on its agenda. The amendment was approved by 20-4-10, with Hungary, Poland, the Ukraine, and the USSR voting against, and Algeria, Argentina, Chile, Madagascar, Niger, Pakistan, Peru, Venezuela, Yugoslavia, and Zaire, abstaining. The Soviet Union made a last minute, again unsuccessful, effort during the closing meeting of ECOSOC's plenary to reverse the Social Committee's decision, by requesting a re-vote. In a separate vote on the paragraph retaining the subject on the agenda, the count was 12-5-7.

I have my doubts as to the prospects of UN action in the near future in elucidation and furtherance of the right in Article 13(2), in view of the East European and Third World inclination to subordinate in the human rights work of the international organization the "classical" civil and political rights to the priority goals of eliminating colonialism, apartheid, and racial discrimination in Southern Africa, and promoting economic and social development in the less developed countries. It is regrettable that the pursuit of these important goals is being used to justify curtailment or even destruction of fundamental rights proclaimed in the Universal Declaration.

I would call your attention to a statement pertinent to this very situation by Wilfred Jenks, Director-General of ILO, himself an eminent jurist, in the introduction to his 1968 report to the International Labour Conference. Mr. Jenks observed that, although ILO was particularly concerned with freedom of association, forced labor, and economic rights generally, all the other fundamental civic rights, such as freedom of opinion, expression, and information, the right of people to express their will in honest election, etc. "are, in a general way, such as to assist in creating the conditions needed if individuals are to want to improve their lot and to be able to do so" While the economic and social rights are ends in themselves, and also help, "sometimes decisively—to realize fundamental aspirations to freedom and equality," those rights "cannot be achieved without promoting fundamental human rights and freedoms." In the introduction to his 1970 report, he reiterated his view that "freedom of association is meaningless without freedom from

arbitrary arrest and detention, freedom of opinion and expression, freedom of assembly, the right to a fair trial," and that trade union rights "rest essentially on civil liberties."

What Mr. Jenks said applies no less to the right to freedom of movement, including that aspect of it which is guaranteed in Article 13(2) of the Universal Declaration. No social goals, whatever their priority—whether decolonization, combating racism, safeguarding national security, controlling brain drain, or promoting economic development—can justify negation or unreasonable restriction of this right.

CLOSING REMARKS BY MR. CHEN:

Dr. Hassouna questioned the appropriateness of my inclusion of the claims of Jews to return to Israel on the ground that they want to settle there, not to return. This question illustrates the complexity of the group claims for return and the need for clarification. Return implies a certain subjectivity and identification on the part of claimants in relation to the area to which they wish to go. Many Jews outside Israel do believe they have significant ties with Israel and identify it as their homeland. In this sense, claims of Jews to return to Israel were included in the examples of group claims. It was meant to be descriptive, not preferential.

A gentleman suggested that there was a potential danger in the policy favoring freedom of movement which I had recommended. Our strong presumption for freedom of return is a presumption: it is neither absolute nor unqualified. Under some conditions freedom of return must, like other freedoms, give way to the appropriate policy of public order. Policies here, as in all law, are complementary. The presumption in favor of freedom of return needs to be balanced by public order considerations—the maintenance of security, health, development, absorbing capacity, and so on for the particular community, having regard also for the impact on other states, the regional community, and the world community. These factors need to be evaluated contextually. To extend the right of return from nationals to all other persons who have significant ties with a particular community would be an important interim step toward a world community honoring freedom of movement.

CLOSING REMARKS BY MR. CHALIDZE

The right to leave is not just a right to travel, a right to return to one's historic homeland, a right to contact with scientists. The right is the ultimate defense, the last legal means of defense from persecution and also exploitation of one's talent. And this right of defense is in every case more important than the brain-drain problem. The experience of the Jews in Germany in the 1930's evidences that the right of departure can indeed mean the difference between life and death.

ARTHUR SILVERSTEIN
Reporter

HUMAN RIGHTS AND ARMED CONFLICT: CONFLICTING VIEWS

The panel convened at 8:40 p.m., April 13, 1973, Telford Taylor* presiding.

REMARKS BY THE CHAIRMAN:

I would like to make one brief point before we go on to our speakers. Having done a good deal of talking on university campuses about the laws of war during the last three years, I have been very much struck by the amount of cynicism, disillusionment, and rejection of the idea of having laws of war at all. When I have endeavored to make a case for them, many students and faculty members have reproached me with the notion that there is something fundamentally inconsistent between the idea of law and the idea of war.

I do not believe that is a valid criticism. We ought to be reminded of what Professor Brierly of Oxford told us a good many years ago—that there is a close affinity between law and war. In fact, he said, “It is the simple truth, though it may sound a paradox, to say that an admixture of law is what differentiates war from mere fighting, and that a rudimentary law of war is coequal with war itself.”

I accept this as a good lesson of history, but it does not go very far to answer the substantive complaints that have been registered from many sources, especially among those somewhat younger than I am: a rejection of the laws of war because of their partial character and erratic scope, (*e.g.*, the lack of anything corresponding to the laws of land warfare pertaining to the air) and, even more, because of the erratic procedures for enforcement. Capturing the enemy or trying your own officers and men is not a very satisfactory method for enforcement.

I think we are at a crossroads, at a point where it is very essential that, instead of sweeping unpleasant subjects under the rug, instead of utilizing the recent cease-fire as a means of forgetting what we do not want to think about, we must make new efforts to bring to the laws coherence and viability.

REMARKS BY GEORGE H. ALDRICH**

It is apparent that the laws of war (by which I mean both the law protecting prisoners, sick and wounded, and civilians under the control of a belligerent on the one hand, and the law governing the conduct of hostilities on the other) are in large part old and in considerable part obsolete. The Geneva Conventions of 1949, the most recent major international instruments in this field, cover the protection of prisoners of war, the sick and wounded, and civilians in occupied territory. But they reflect the experience of World War II, and their applicability to

* Of the New York Bar.

** Deputy Legal Adviser, Department of State.

more recent types of warfare is not always easy. Civil wars, mixed civil and international conflicts, and guerrilla warfare in general all raise problems under those conventions. Moreover, all too often nations refuse to apply the conventions in situations where they clearly should be applied. Attempts to justify such refusals are often based on differences between the conflicts presently encountered and those for which the conventions were supposedly adopted. Other aspects of the laws of war, except for the use of poison gas and bacteriological weapons (which were the subjects of the 1925 Geneva Gas Protocol), and the protection of cultural property (the subject of a 1954 Convention), have been left untouched since the Hague Conventions of 1907. The expansion of military objectives and changes in weaponry and fire power have increased many fold the vulnerability of noncombatants. The law has not developed apace.

Present Efforts at Development

The International Committee of the Red Cross (ICRC) has taken the lead in reexamining those laws of war specifically applicable to the protection of war victims. Acting under a mandate given by the 21st International Conference of the Red Cross in 1969, the ICRC sponsored conferences of government experts in both 1971 and 1972 to consider where progress may be possible. Those conferences, the second and broader of which was attended by experts from 77 governments, including the United States, considered ways in which the international humanitarian law applicable in armed conflict can be further developed. Preliminary drafts were discussed with a view to advising the ICRC in its further drafting efforts. The ICRC intends to produce drafts to serve as the basis for negotiations at a diplomatic conference to be convened by the Swiss Government in Geneva in February of next year. Probably these drafts will take the form of two protocols to the Geneva Conventions of 1949, one dealing with international armed conflicts and the other with noninternational armed conflicts.

The United States has welcomed this initiative by the ICRC and its careful preparatory work. The forthcoming diplomatic conference will be a major step in the process of bringing the law up to date, and I can assure you that we shall participate fully and enthusiastically.

There has also been some helpful activity in the United Nations with regard to human rights in armed conflict, in particular, several extensive reports by the Secretary-General and a number of resolutions approved by the last few General Assemblies. While appreciative of these contributions, I believe the drafting and consultative efforts by the ICRC and the forthcoming conference will be more directly productive of new international law.

Problems with Existing Law and Prospects for Improvement

Permit me to turn now to some of the deficiencies in the existing law and our hopes for improvement. Deficiencies are found in both

the substance of the existing law and in its application and enforcement. Of the two, the latter is in our view the more important and probably the more difficult to correct. If we cannot induce compliance with the broadly accepted Geneva Conventions of 1949, it will be of little value to have new conventions for states to disregard at will.

Implementation: Naturally, the example of most recent and direct concern to those of us in the U.S. Government is that of Vietnam. By mid-1965 it had become apparent to the ICRC that the conflict in Vietnam had become an "international armed conflict" requiring application of the Geneva Conventions in their entirety. The Committee so informed the parties to the conflict. The United States and the Republic of Vietnam agreed and stated that they would apply the conventions. The Democratic Republic of Vietnam and the National Liberation Front, on the other hand, responded negatively and have refused on various grounds to apply the conventions.

North Vietnam denied the applicability of the Geneva Prisoner-of-War Convention on the ground that our men were "war criminals" who were not entitled to benefit from the protection of the convention. In support of that contention, North Vietnam referred to its reservation to Article 85 of the convention (which parallels that of other communist governments) exempting convicted war criminals from its protection. That argument is specious for several reasons: most fundamentally because to deny the protection of the convention to all captured military personnel on the basis of a unilateral assertion that they are all war criminals is to make a mockery of both the convention and the customary law upon which it rests. Beyond that, the reservation was distorted by North Vietnam to make it applicable even before trial and conviction.

The ICRC stated, first privately to Hanoi and finally publicly, that this position was unacceptable. This could not have surprised the North Vietnamese leaders, as they must have known that the argument had no merit. It is obvious that, for various reasons, they decided in 1965 to isolate and mistreat the prisoners they were taking, to prohibit or severely restrict their contact with the exterior, and to refuse to acknowledge which men were prisoners. Since the Geneva Convention inconveniently proscribed each of these measures, some excuse had to be found to ignore it. Although their excuse was untenable, neither the convention nor general international law has provided any effective remedy for this flagrant disregard of international obligations, and our persistent efforts to bring about some type of impartial inspection of detention conditions continued to be rebuffed.

However much our preoccupation with it, Vietnam is not the only example of inadequate compliance with the law. The conflict in the Middle East has also produced some more limited refusals to apply the Geneva Conventions. In 1967 at the time of the six-day war, arrangements were made quickly, with assistance from the ICRC, for the release and repatriation of prisoners of war. However, in subsequent years there have been instances in which Egypt has refused to return several seriously sick or wounded Israeli pilots. Israel, as occupant of the terri-

tory seized during the fighting in 1967, is bound by the Fourth Geneva Convention (that for the protection of civilians) but Israel refuses to apply the convention. Israel maintains that it treats the inhabitants of the occupied areas better than the convention requires, and that may well be in many respects, but there are a number of Israeli actions that seem inconsistent with the convention. For example, the convention forbids collective punishments; yet private homes have been destroyed without the requirements of proof or a trial when the owners are suspected of having knowledge of Arab terrorists and not reporting that knowledge. Also, despite the prohibition in the convention on the forced relocation of persons, there have been cases in which Arab residents were deported, rather than fined or imprisoned, for criminal offenses. Again, judicial safeguards are often unavailable.

Other examples can be cited; Pakistan in Bangladesh and the United Kingdom in Northern Ireland have refused to acknowledge the applicability of Article 3 common to the four Geneva Conventions concerning noninternational armed conflicts. India and Bangladesh, while acknowledging applicability of the Prisoner-of-War Convention to Pakistani prisoners, have thus far refused to repatriate them.

One very clear lesson from these experiences, particularly from Vietnam, is that the conventions provide inadequate mechanisms to establish and carry out independent observation of performance. The conventions *assume* the establishment of protecting powers; they do not explicitly require the appointment of either a protecting power or a substitute for a protecting power. The ICRC, whose traditional humanitarian functions are recognized by the conventions, is given no treaty right to operate on the territory of a party unless that party decides to authorize it in a specific case.

As we made clear in the recent conferences of government experts in Geneva, we believe first priority must be given to improving the application and enforcement of the existing law. The United States presented certain proposals to the conference to establish procedures for the appointment of a protecting power and to commit states to accept the ICRC as a substitute therefore in the absence of a protecting power. We intend to pursue this question at the diplomatic conference. Our basic aim, of course, is to make some external observation of compliance more likely. We recognize there can be no guarantee that a nation will not flout its international obligations, but the law should be so framed as to increase the costs of such conduct and thereby make it less likely.

Turning now from the implementation of the existing law to its substantive inadequacies, there are three which I would like to discuss. Present law seems clearly inadequate to (1) prevent unnecessary suffering in civil wars or mixed international and noninternational conflicts, (2) deal realistically with the treatment of guerrillas, and (3) protect the civilian population from combat operations.

Noninternational armed conflicts: It is not really surprising that international law, which is principally concerned with the relations between nations, should deal very gingerly with civil wars, for we can all agree

that the international protection of human rights has developed only slowly and within a very limited scope. International humanitarian law, as it applies to civil wars, is found in a single article, Article 3, common to all four Geneva Conventions, which establishes certain minimum humanitarian standards applicable to government and rebels alike. It provides for humane treatment of noncombatants including prisoners and the sick and wounded, and forbids murder, torture, the taking of hostages, humiliating and degrading treatment, and the passing of sentences without benefit of fair judicial process. Although limited in scope and precision, that article, if consistently applied in practice, would go far to reduce the suffering caused by civil wars. Perhaps its most significant omission is any requirement for independent external observation of compliance.

Any effort to expand these protections must take into account very real difficulties. In the first place there is a general concern of governments that the acceptance of international standards for a civil war connotes international recognition of the insurgents. This concern results from the historical development of the law; in customary law the international laws of war become applicable to a civil war upon international recognition of the rebels as belligerents. This concern persists despite an explicit provision in common Article 3 that its application shall not affect the legal status of the parties to the conflict. Personally, I deplore the fact that this concern so often effectively prevents official admission that an internal armed conflict is one to which Article 3 applies, but we cannot ignore that political reality. Governments will predictably remain unwilling to do anything that could enhance the perceived status of rebels or give any appearance of legitimacy to their actions.

Despite these difficulties, a number of important advances in the law should be attainable, and it would be inexcusable if we made less than a maximum effort to achieve them. For example, it should be possible to add considerably to the specific requirements for humane treatment contained in common Article 3 by referring to the types of outrages that have become all too common, particularly the taking of hostages, terroristic violence, and cruel treatment of all sorts. Moreover, special protections should be accorded women and children, medical units and personnel, and all persons captured or detained. It should be possible to prohibit attacks on noncombatants and on the civilian population as such and also certain types of forced movements of civilians. I hope that it may prove feasible to include meaningful obligations to permit the passage of food and relief supplies for noncombatants. Perhaps the most important improvement would be a clear statement that the protocol on noninternational armed conflicts comes into force at such a low level of conflict as to make it more difficult than at present to deny its applicability.

Treatment of guerrillas: With respect to the treatment of guerrillas—combatants who are not members of regular armed forces—the experience of World War II resulted in a provision in Article 4 of the Geneva Prisoner-of-War Convention which accords to certain guerrillas

involved in international conflicts the right to be treated as prisoners of war. Previously, as unprivileged belligerents, guerrillas enjoyed no protected status and could legally be executed. However, this entitlement to POW treatment in the convention is limited to guerrilla groups which meet the following five criteria: (1) they belong to a party to the conflict; (2) they are commanded by a person responsible for his subordinates; (3) they have a fixed sign recognizable at a distance; (4) they carry arms openly; and (5) they conduct their operations in accordance with the laws and customs of war. When viewed in the light of guerrilla war as we have known it in recent years, some of these criteria seem a bit quaint. In Vietnam, for example, thousands of the Viet Cong troops had no fixed sign, did not carry arms openly, and frequently did not abide by the laws of war. Nevertheless, except for terrorists, spies, and saboteurs, the United States and the Government of the Republic of Vietnam have treated them as prisoners of war. We took the position that any member of the North Vietnamese armed forces and any member of a main force Viet Cong unit should be treated as a POW. In addition, we treated other guerrillas as POW's whenever they were captured with weapons in battle.

If our experience in Vietnam could be applied generally, it would be a relatively simple matter to liberalize the strict standards of the convention. However, it is not yet clear that it can be easily applied to different situations. Much depends on the circumstances of each conflict. In the Middle East, for example, the independence of guerrilla groups that are often not subject to control by any government has been a serious problem. What means are there to induce groups such as these to abstain from the use of terrorism against civilians, which they may see as their only effective weapon? And if they will not abstain, government forces that take them into custody can scarcely be expected to regard them as prisoners of war.

On the other hand, we should not overlook the possibility that, within limits, the prospect of POW treatment can be used as an incentive. In other words, guerrilla groups might be induced to conduct their operations in accordance with law if they knew that doing so would result in their being treated as POW's if captured and provided that doing so would not make it impossible for them to fight effectively. I think it likely, for example, that states may be able to agree to drop the requirement of having a fixed sign recognizable at a distance and to limit the requirement of carrying arms openly to such times as the guerrillas are engaged in their military operations. This subject is full of difficulties, but a workable compromise should not be beyond our reach.

Protection of the civilian population: Issues of a totally different—and I fear much more formidable—sort are presented by our efforts to develop law that will give meaningful protection to civilians. The history of the 20th century should quickly dispel any notion that the rise of humanitarianism and the protection of human rights, which have strongly influenced modern developments in international law, are effective pressures for the protection of noncombatants from the effects of war. What

we have seen is all too clearly a general acceptance of the view that modern war is aimed, not merely at the enemy's military forces, but at the enemy's willingness and ability to pursue its war aims. Thus, in World War II, the enemy's will to fight and his capacity to produce weapons were primary targets, and saturation bombing, blockade of food supplies, and indiscriminate terror weapons, such as the German V bombs, were all brought to bear on those targets. In Vietnam, political rather than military objectives were even more dominant. Both sides had as their goal not the destruction of the other's military forces but the destruction of the will to continue the struggle. To that end the United States bombed and mined ports, rivers, and other lines of communication without invading North Vietnam, and our enemies launched rockets against cities, assassinated government officials and other influential civilians, and tortured prisoners to obtain propaganda statements, without any hope of destroying American military strength.

Given the nature and goals of contemporary warfare, quick and easy answers will not solve the problem of protecting civilians, at least not in the context of a negotiation on the laws of war. One could imagine prohibiting attacks on urban areas except by weapons so controlled and so discriminate that only military installations would be damaged. I believe we would all agree that this would be an excellent rule, but we have to accept the fact that it would fundamentally change the nature of modern conventional war and would almost completely preclude nuclear war. This is why we cannot seriously expect such dramatic results from the 1974 diplomatic conference. Proposals along these lines are, in reality, proposals for revolutionary change which would require a fundamental reordering of national security planning. However desirable they may be, they demand more than the lawyers and diplomats who attend the conference to supplement the Geneva Conventions can be expected to produce, and we must see them as longer-range objectives.

I do not want to suggest that additional protections for civilians are not essential in terms of results of the 1974 conference. On the contrary, significant and worthwhile improvements in civilian protection can be achieved if we concentrate on proposals that are more limited. For example, we can and should devise rules to promote care by armed forces in avoiding unnecessary injury to civilians and damage to civilian property and to make safety zones a workable concept in the real world. While I believe it unrealistic to prohibit all attacks on hydroelectric dams and power stations, as some have suggested, we should try to clarify the rule of proportionality and particularly its applicability to such situations. We need rules as concrete as possible so as to be conducive to application by the troops in the field as well as by governments in their national security planning.

One specific rule that may be feasible is to prohibit the use of starvation as a weapon of war. One of the oldest weapons, it tends to be one of the least discriminate since civilians are more likely to go hungry than are soldiers. The generally accepted rule today is that crops and food supplies may be destroyed if they are intended solely for the use

of armed forces or if their destruction is required by military necessity and is not disproportionate to the military advantage gained. As you know, in Indochina we tried a limited program of crop destruction in isolated areas where the evidence was strong that the crops were intended for enemy troops. Although this program was legal, President Nixon ended it several years ago, and I believe we should give serious consideration to agreeing to prohibit deliberate crop destruction in the future. I would hope that new rules can also be developed to reduce or eliminate the possibility that starvation will result from blockade, perhaps by requiring the passage of food supplies provided only that distribution is made solely to civilians and is supervised by the ICRC or some other appropriate external body.

With respect to prohibitions of specific weapons on the ground that they cause unnecessary suffering or are inherently indiscriminate, I believe most efforts in this direction are misconceived. Virtually any weapon can be used indiscriminately, and even weapons of mass destruction can be used discriminately in certain circumstances. It is obviously much more difficult to avoid indiscriminate use within a populated city than in a desert or at sea. Whether the suffering a weapon causes is "unnecessary" in the sense required to make it unlawful requires a balancing of this suffering against the military necessity for its use. Thus, napalm, which certainly causes terrible suffering, is generally viewed as lawful because it is uniquely effective for certain military purposes, particularly against underground fortifications and against armor. Perhaps the development of laser-guided weapons or other new weapons will reduce the necessity for napalm to the point where it can be prohibited, but it seems doubtful that we have yet reached that point.

International law can and should compel governments to refrain from developing weapons that cause unnecessary suffering and to renounce the use of such weapons. It does not follow, however, that negotiating through general international conferences is a satisfactory way of doing this. States which, for whatever reason, do not possess or use certain weapons will doubtless be more willing to prohibit them than states that rely on them. Similarly, states which rely more on massed manpower for military strength than on firepower and mobility would be likely to see security advantages in prohibiting many weapons. There should be little wonder that many governments—and particularly those of the technologically most advanced states—hesitate to submit questions of importance to their national security to such procedures. I suggest that efforts to devise procedural rules that require governments to justify thoroughly and carefully the legality of weapons they develop are likely to be more successful than attempts to negotiate an agreed list of prohibited weapons. I am afraid that any such list of weapons, or the parties to it, or both, would be embarrassingly brief.

In these remarks, as in any survey of the laws of war, the deficiencies are writ large for all to see. Given the stakes, progress is imperative. An attitude of mere openmindedness and detachment will not suffice.

There must be added a sense of commitment to the goal of reducing by means of law the human suffering that always accompanies resort to armed force. The United States has that sense of commitment. If anything, it has been sharpened by our grim experience with guerrilla warfare and counterinsurgency in Indochina. In cooperation with others who share that commitment, we shall do our best to forge a better law and promote respect for human values. That is a worthy task, and one for which I believe the time is right.

The CHAIRMAN thanked Mr. Aldrich for reminding us that the subject under discussion cannot be viewed exclusively through the lens of Vietnam. He observed that the immediacy of Vietnam has tended to narrow the focus with which we view many of these problems.

REMARKS BY HANS BLIX*

Modern mass media feed, or overfeed us with reports on the horrors of armed conflicts. Little is heard, however, about restraints observed in accordance with valid rules. Little is also heard about the efforts made in recent years to update the rules applicable in armed conflicts. Even international lawyers know much more about the proposals to update the law of the sea than about the draft rules worked out by the ICRC for international and noninternational armed conflicts. There is also ignorance about the conferences of government experts which have discussed the ICRC drafts in Geneva in 1971 and 1972 and the world conference proposed by the Swiss Government to convene early in 1974.

There may be several reasons for this ignorance. First, news about lawmaking is rarely as exciting as news about lawbreaking or about conditions which call for legislation. Second, the trends in modern armed conflicts have left a certain feeling that it is hopeless to legislate to reduce the sufferings brought by these conflicts. If more testimony were given concerning the restraints which are still caused by existing rules relating to armed conflicts, this scepticism might be less common. Third, lack of knowledge and interest in the present efforts is also caused by the deliberate, and in my view mistaken, effort of the ICRC and of several governments to handle the updating of the law of modern armed conflicts through quiet diplomacy.

The two expert conferences have been closed to the public and press. A few meager press releases during the conferences and formidable volumes of documents thereafter have not helped to engage the public or our profession. For several years UN discussion of the matter was in the Third Committee of the General Assembly. This accorded with a feeling which I believe existed in some quarters that the less serious a UN engagement in the matter, the better. It was only last year that the item was moved, against much resistance, to the Sixth Committee. When it eventually landed there, the time available for discussion was

* Legal Adviser, Royal Ministry of Foreign Affairs of Sweden.

short, because the Committee's attention was focused mainly on the item of terrorism—the reckless violent acts of small and desperate fighting groups. Control of *large scale* violence between established belligerents was not given the same priority. The letter-bombs sent to an unwitting victim were in focus, but the same type of bombs spread by the hundreds of thousands over areas where unwitting civilians might have a foot blown off was out of focus.

I submit that the failure to engage the public in this item is unfortunate. The rules relating to armed conflicts, like few other areas of the law, are of concern to the public at large.

The scope of the present effort is controversial. The ICRC has presented its drafts as additions to the four Geneva Conventions of 1949 and has evidenced certain inhibitions in going beyond what it terms “humanitarian law.” A distinction is sometimes made between the law of the Hague and the law of Geneva with the implicit notion that only the Geneva Conventions are “humanitarian law.” I submit that, from the viewpoint of states, this distinction is almost wholly artificial and that the law of armed conflicts should be treated as a whole. It is no less humanitarian to consider a ban on the use of napalm than to consider rules for the care of those wounded by napalm. Indeed, it would seem to me that the law of the Hague is in even more dire need of updating than the law of Geneva. The law of the Hague dates from the turn of the century; the law of Geneva from 1949. The fact that the ICRC has been the forum of the present efforts should not be allowed to stand in the way of a broad approach. In fact, the ICRC itself has not found it possible to confine its proposals to the law of Geneva, but has drafted rules elaborating, for instance, the Hague ban on treacherous methods of warfare. I submit this is the better course of action.

The main factors which cause the need for updating the law of armed conflicts are well known. The present law is devised largely to regulate international conflict between regular armed forces on land and at sea. It deals with civil war only by the rudimentary rules of Article 3 of the Geneva Conventions; yet noninternational conflicts are the most frequent. It does not seek to regulate guerilla warfare; yet, that method, whether used by partisans, commandoes, saboteurs, or part-time soldiers, is present in most modern armed conflicts. It has no rules expressly devised to deal with air warfare or even more modern methods, like electronic warfare. Further, no “conventional” weapons have been banned for use since the dum dum bullets.

As is natural, when different political and military interests are effected, states have different priorities among these items. Proposals which would give POW status a little more generously than the present rules do, in order to cover certain guerilla units, are deemed dangerous by some and too conservative by others. On this matter the Western world, on the whole, appears to take a position in the middle, and supports the relatively moderate proposals by the ICRC for regulation of noninternational conflicts. Those requesting that the level of the conflict should

be extremely high before the rules can apply are, not surprisingly, found in parts of the world where such conflicts may well occur.

By contrast, many of the technologically developed states of the Western alliance, or at least their experts, have taken very cautious or restrained attitudes toward proposals for prohibition or restriction of area bombardment, or attacks upon specific targets, like dams and dykes, or objects indispensable to the civilian population. This reticence has been even stronger as regards discussion of possible bans or restrictions on the use of specific conventional weapons. Instead, these experts have emphasized the need for new rules relating to the evacuation of sick and wounded soldiers from the battlefield, rules for better supervision of existing conventions, and more effective rules for the appointment of protecting powers. The humanitarian and practical importance of review and reform in these spheres thus emphasized should not be underrated. But I submit that governments would respond miserably to the needs of the world community, if efforts were concentrated upon these spheres and indifference and passiveness were shown to the other areas mentioned. A world conference in 1974 could be a new Hague conference, if governments so choose—if general staffs, ministries of defense and foreign affairs, and legislators decide to take a fresh look and assess their long-term interests, including the humanitarian interests.

Lawyers in the United States have a tradition which, in my view, places a special obligation upon them to take a constructive part in this work. As a former student of Columbia University, I cannot fail to recall that the Hague Regulations of 1899 had their roots in the *Instructions for the Government of Armies of the United States in the Field*, which were drafted by Professor Francis Lieber of Columbia College and that John Basset Moore, Professor at the Law School of Columbia University, was the Chairman of the Commission of Jurists which was convoked by the Washington Conference on the Limitation of Armaments and which drafted the 1923 Hague Rules of Air Warfare. It is fitting that for some time the American Society of International Law has had a special panel working on humanitarian law applicable in armed conflicts.

I should now like to discuss a few specific areas of the law relating to armed conflicts and proposals made concerning them. A few remarks by way of introduction. War has tended to become again more total, in the sense of involving the civilian population. During the Thirty Years War, horrible losses were inflicted among civilians. The service for a period on the Swedish General Staff of no less a person than Hugo Grotius apparently did not much restrain my ancestors. In the period up to World War I, however, the proportion of civilian losses decreased, thanks partly to the rules of warfare. This development has been reversed since then. Statistical figures vary, but all show a sharp increase in the proportion of civilian losses in war. Assessments, which appear plausible, give 5 or more per cent of the dead in World War I as civilians; an average of 50 per cent of the dead in World War II as civilians; perhaps

around 60 per cent of the dead in the Korean war as civilians, and for the Vietnam war some 70 per cent of the disabled have been stated to be civilians.¹ One might draw the conclusion that it is safer these days to be in the military than to be a civilian. There are, no doubt, several factors which have combined to bring this terrible result. If there is a wish to avoid it in future conflicts, these factors must be considered.

Guerilla warfare is one. If doctrine and practice in some quarters were to seek to involve the whole civilian population in the actual armed struggle, then obviously there would be no way of protecting it. And if doctrine and practice in other quarters were to seek to drain a sea of civilians in which guerillas swim like fish, then again the civilian population would be bound to suffer terribly. Disregarding the two extremes, however, I believe there is room for rules designed to afford better protection in the more likely case where the larger part of a civilian population does not take an immediate part in hostilities, for example, rules designed to prevent starvation and rules encouraging guerillas to distinguish themselves from civilians during combat operations by offering POW status to them on this and few other conditions.

Modern air warfare, particularly large scale bombardment, is undoubtedly another main cause of the increasing losses among civilians. Guernica, Canton, London, Coventry, Düsseldorf, Hamburg, Dresden, Rotterdam, Tokyo, and Pyongyang mark the evolution. The air warfare in Indochina, with strike zones, free fire zones, and the bombing of cities has also been deemed to be a main cause of the high rate of civilian casualties in that conflict. What can be done in this sphere leaving aside the question of nuclear warfare?

Obviously we cannot, like France and Britain at the 1932 disarmament conference, propose the abolition of all bombing aircraft.² Nor can we content ourselves with regret that the 1923 Hague Rules did not enter into force and fall back upon the basic precept stated in the famous preamble of the 1868 St. Petersburg Declaration that:

... the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy.

and Article 25 of the Hague Regulations that:

The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

These basic precepts have evidently been too general to cause any significant restraints in the process toward total air war. The question of the legality of the modern practices is important. However, I shall forego it here and deal only with the *lex ferenda*.

In my view, this is a late but appropriate moment for governments to take a good fresh look with a long-term perspective at the question of area bombardment in general and its application to big cities in particular. They will, of course, have to consider the question of military

¹ Figures through Sept. 1971 in Congressional Record of May 3, 1972.

² J. W. SPAIGHT, *AIR POWER AND WAR RIGHTS* 245-47 (3rd ed. 1947).

utility of such bombardments. We know that that utility was questioned in *The United States Strategic Bombing Survey* after World War II and that it has, likewise, been questioned in the Indochina conflict. It would seem to me that the military value of area bombardment should have to be proved not only plausible but very considerable for any state to argue future permissibility in the face of the dreadful effects of the practices upon civilian populations. States must, no doubt, also consider the risk that the practices may be applied to themselves.

The ICRC has offered two draft provisions which form a good basis for discussion.

Attacks which, by their nature, are launched against civilians and military objectives indiscriminately, shall be prohibited.³

The other reads in part:

. . . the Parties to the conflict shall refrain from attacking as one sole objective, by means of bombardment or any other methods, an area comprising several military objectives which are at some distance from each other and situated in populated regions.⁴

These draft rules have not been subjected to extensive debates. But they were subjected to a very large number of amendments, demonstrating that the draft rules were not readily acceptable to all. The prohibition of area bombardment is absent in the amendments of the big Western states. And the question of indiscriminate attacks is handled as follows in an amendment submitted by experts of Australia, Belgium, Canada, the Federal Republic of Germany, the United Kingdom, and the United States:

Attacks which are intentionally launched indiscriminately against civilians and military objectives shall be prohibited.⁵

"Indiscriminate attacks" were explained in a proposal by the U.S. experts to be those attacks "which have no specific military objective."⁶ The positions taken by these Western experts are not hopeful. One of them stated explicitly at the 1972 ICRC Conference:

. . . we cannot expect governments easily to undertake commitments to eschew attacks on the urban, industrial sinews of its enemies, to refrain from area bombardment, or to spare essential lines of communication . . .

No one suggests that these commitments shall be undertaken "easily." Rather that the proposals shall not be brushed aside easily. They should, in my view, be given serious consideration at high levels in all governments and be subjected to earnest discussion between governments. Perhaps then there would be some hope for international agree-

³ Art. 45(3) in ICRC I Basic Texts (1972).

⁴ *Id.*, Art. 50(2).

⁵ See Doc. CE/COM III/PC 106 in ICRC II Report on the Work of the Conference (1972).

⁶ CE/COM III/PC 110.

ments along the line taken in the military manual of the Federal Republic of Germany.

It is forbidden to treat several military targets and living quarters between them as a single target and indiscriminately to attack or bombard this area in its entire extension.⁷

Let me now turn to another area, the question of *prohibition of attack of special categories of objects*. In the 1972 ICRC draft it was proposed that "objects indispensable to the survival of the civilian population" should not be attacked even by way of reprisals.⁸ In an amendment submitted by the experts of Egypt, Mexico, the Netherlands, Sweden, and Switzerland this proposal was strengthened to read:

Objects which are indispensable to the survival of the civilian population, such as foodstuffs and food-producing areas, crops, cattle, water resources and constructions intended for the regulation of such resources must never be subject of attacks directly launched against them, nor be attacked by way of reprisals.⁹

An amendment by Australian experts went in the opposite direction and sought to delete even the ICRC text and to rely upon the following general and modest injunction:

Those objects whose destruction would give neither long-term nor short-term military advantage are non-military objects and *should* never be attacked.¹⁰

The world would do better without any rule than with one of this kind. Furthermore the question of a ban on crop destruction should, like the question of a ban on area bombardment, be given serious thought at high levels. We know that the civilians are the first and the soldiers the last to suffer from attacks upon objects like food, cattle, and crops. My views are not extreme. Let me quote an article by an American retired flying officer who generally seems cautious in his views:

Purposeful destruction of crops and intentional interference with a nation's food supply, historically ineffective, inhumane, and disproportionate must be held to be presumptively impermissible.¹¹

Another category of targets that would merit absolute immunity from attack are those the destruction or damaging of which may cause dangers for grave losses among the civilian population or grave damage to civilian objects. I have in mind objects such as dams, dykes, nuclear power stations. Proposals in this direction have been submitted to the ICRC. It is not hard to imagine the catastrophes which would result from successful attacks upon systems of water control like the Tennessee Valley, the Aswan Dam or the dykes of the Netherlands. In a statement before the Sixth Committee during the last General Assembly, I

⁷ Commentary on Art. 68; cf. the example under Art. 65.

⁸ Art. 48(1).

⁹ CE/COM III/PC 64.

¹⁰ CE/COM III/PC 93. Italics supplied.

¹¹ G. J. Adler, *Targets in War: Legal Considerations*, 8 HOUSTON L. R. 39 (1970).

cited the work *The United States Air Force in Korea 1950—1953*¹² to demonstrate how U.S. generals were reluctant to agree to air attacks upon irrigation dams to flood large rice areas in Korea, how they argued that such an operation would be the ultimate in air pressure, and how they eventually agreed to an attack which destroyed the Toksan Dam on May 13, 1953 and resulted in a flood that destroyed about 700 buildings and scoured five square miles of prime rice crops.

The almost instinctive human aversion to the destruction of systems for the control of water and for irrigation of land has been demonstrated most recently, of course, in reactions to U.S. attacks which damaged dykes and involved risks of floods in Indochina. In my view, governments should transform this aversion to destroy into a legal restriction. After all, our inhibitions in this sphere do not seem to be so plentiful that we can allow ourselves to waste any of them.

The last area I propose to take up relates to *prohibition of use of specific conventional weapons*. The ICRC proposals of 1972 contained a draft article stating that "It is forbidden to use weapons, projectiles or substances calculated to cause unnecessary suffering or particularly cruel methods and means" (Art. 30(2)). This is in part a restatement of Article 23(e) of the Hague Regulations. Some fourteen experts at the 1972 ICRC conference wanted to supplement this proposal first, by a general provision prohibiting the use of weapons and methods of warfare which are likely to affect combatants and civilians indiscriminately and secondly, by a list of specific weapons which would be deemed prohibited under these rules, *e.g.*, certain delayed action weapons, certain incendiary weapons, and certain fragmentation bombs. A number of other experts, from the Netherlands, Jordan, Spain, and other countries, submitted proposals that went in the same direction. All these proposals remain controversial. What is the controversy about?

The argument has been advanced that the weapons question is so complex and requires such special expertise that it must be handled in the disarmament sphere. The Soviet Union has joined in this view, which is taken by many, but not all, members of the Western alliance. The argument is not seen by the other side as very persuasive. Many other proposals to be taken up in the ICRC context are militarily complex and will require military expertise.

Another argument has been that the discussion of the weapons question would overcharge the forthcoming diplomatic conference. But why is it precisely this problem that is the drop that would make the jug overflow? The conference is likely to need at least two sessions. There would be time and room for a special committee working on this matter at both sessions and, if need be, between them. Suggestions that the matter belongs to the disarmament sphere are also somewhat puzzling when they come from a state like France, which does not participate in the Geneva disarmament conference. Indeed, if it were taken up at that conference, China as well would be outside the discussions.

¹² Written by R. F. Futrell, USAF Historical Division (1961).

Moreover, proposals for prohibitions or restrictions on the *use* of certain weapons do not strictly qualify as disarmament, since there would be no physical elimination of the weapons. The ambition is less broad; the weapons could remain, but they could not be used.

The resistance to discussion in the ICRC context of the weapons item is puzzling, especially since most of the present proposals (unlike those of the ICRC in New Delhi in 1956) were confined to *conventional* weapons and thus designed not to disturb the balance of terror.

The resistance to assist in the compilation of facts was conspicuous when the Secretary-General was asked (as he himself had suggested he might be) to prepare a report on napalm and other incendiary weapons. When the Secretary-General tried to get government consultants to assist him in the preparation of the report, it turned out that no member of the Western alliance would lend him this assistance. Apart from Communist governments only the governments of Mexico, Peru, Sweden, and Nigeria supplied experts. It may be queried whether this tactic of the Western alliance vis-à-vis a fact-finding exercise was a wise one. Attachment to objective facts and open discussion has usually been claimed as a strength of democratic states.

Indeed, factual reports, not only on incendiary weapons, but also on a number of other conventional weapons are needed for governments to consider intelligently the possibility of new prohibitions or restrictions on the use of specific weapons. The napalm report is now before the world and I do not think any government would charge that it is a propagandistic paper.

To many it is evident that the general injunction in Article 23(e) of the Hague Regulation against weapons causing "unnecessary suffering" does not give enough guidance. The U.S. Manual of Land Warfare, Sec. 34, interprets it as follows:

What weapons cause "unnecessary injury" can only be determined in the light of the practice of states in refraining from the use of a given weapon because it is believed to have that effect. The prohibition certainly does not extend to the use of explosives contained in artillery, projectiles, rockets, or hand grenades. Usage has, however, established the illegality of the use of lances with barbed heads, irregular shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard case of bullets.

The British Manual of Military Law, Sec. 110, is in part identical with the U.S. manual.

To the people who find the general injunction in the Hague Regulation insufficient it is puzzling that there should be such great reluctance to consider whether the general rule should be given specific application to more modern contrivances than lances with barbed heads, and this in a modern context where the general rule is expressly confirmed.

The first requirement in this endeavor is obviously to compile the facts. The UN report on napalm is a start, and a meeting of individual

experts from various countries was recently held under the auspices of the ICRC to plan a report on some types of conventional weapons. It is expected that these experts will assist the ICRC to present a factual report on high-velocity projectiles, fragmentation and pellet bombs and other area weapons, delayed action weapons, laser, etc. It would seem to me that this search for facts about weapons and the assessment of the degrees of suffering they cause or the degree of indiscriminateness they may possess and, thereafter, the consideration of possible prohibitions of use is in the interest of all.

In connection with the reference to Francis Lieber, the CHAIRMAN remarked that Lieber's involvement in drafting General Order 100 stemmed from a letter from General Halleck, who at that time occupied an office somewhat like that of Chief of Staff to the President. The General described the behavior of some of our Southern friends, who were shooting at Union soldiers without, alas, wearing the grey they should have worn. His terms were virtually identical to the way an harassed battalion commander in Vietnam might have described the behavior of the Viet Cong. The parallel is so close as to be very startling and the remedy Lieber prescribed is very similar to what we have today. The problems we have are not, therefore, new ones.

The CHAIRMAN commented on the divergence of approach of the two principal speakers: Mr. Aldrich believes we should deal first with those things he feels *can* be dealt with successfully, while Mr. Blix feels we should deal with those things which are *most necessary*. The CHAIRMAN felt that all shared this problem of attitude in varying degrees. The dispute with respect to the proper forum, he felt, was more susceptible to precise delineation. He agreed with Mr. Aldrich that lawyers and diplomats by themselves could not solve the problems. The question, then, is how is one to achieve the requisite degree of involvement of those who *can* deal with them and thus produce a meaningful conference.

REMARKS BY FRITS KALSHOVEN*

The two highly interesting and stimulating presentations we have just heard provide us with an excellent survey of a number of important aspects of the law of armed conflicts, both as it stands today and from the point of view of *lex ferenda*. As George Aldrich correctly predicted, although the program for this meeting promised "conflicting views," there appears to be much common ground between him and Hans Blix, much more than in fact has been apparent of late between the U.S. and Swedish Governments on certain other (though related) matters.

As the first commentator I would like to begin by pointing out some major areas of disagreement which, notwithstanding all this ostensible harmony, can be discerned between these two statements, adding where necessary my own views.

* University of Leiden.

It seems to me that the areas where the two speakers disagree most markedly can be brought under three headings: the tactics to be followed in the present lawmaking efforts; the relative emphasis to be given to implementation of existing law or creation of new law; and the desirability and feasibility of certain specific innovations.

In the tactical sphere, the two speakers differ in their appreciation of the two possible approaches, viz., the method of quiet diplomacy or a procedure with a more open character and involving the public at large more directly. Up to now, the first method has been adopted by the ICRC, whereas procedures of the latter type are more in line with standard UN practice. Hans Blix expressed himself in favor of an open procedure, arguing that the rules relating to armed conflicts, like few other areas of the law, are of concern to the public at large. I fully support the view that the law of armed conflicts is a matter of direct concern to the public in its broadest sense. Yet, what we are involved in at present is a lawcreating process rather than an effort to disseminate knowledge of existing law. At this stage, there may be certain disadvantages in giving too much influence to public opinion. It has become sufficiently evident in the recent past that in matters of *jus in bello* public opinion is apt to be strongly influenced by considerations completely foreign to the subject (and which will often be ideologically determined). Indeed, opinions about such matters as the admissibility or inadmissibility of the use of certain modern means or methods of warfare in a particular armed conflict (Vietnam, for instance) often appear to have been based on a preference for one or the other side in the conflict or on feelings about the participation of a particular state (such as the United States) in the conflict, rather than on any insight into the nature, the rules and principles, or the problems of the law of armed conflicts.

In this light, the method of quiet diplomacy as pursued by the ICRC seems to have a marked advantage. After all, the purpose of the present effort is to create effective new law, that is, to engage the governments in the first place. With George Aldrich I believe that the method chosen by the ICRC is the one most suitable for overcoming the grave difficulties arising out of the highly delicate nature of many of the problems involved and for bringing about the desired concrete results.

I realize, of course, that there is a dilemma here. For governments to get involved, they may need some gentle pressure from their own public opinion, and such pressure can only be expected when the public is made to take an interest in the matter. If one wants to create this interest and yet avoid the ideologically determined bias I have referred to, it will be necessary to provide the public with the right kind of information so as to provoke the right kind of pressure in the right places. This, however, resembles all too closely the type of dictatorially manipulated information process leading to biased opinions which I rejected in the first place. I fail to perceive an easy way out of this dilemma; it will have to be conceded that either method has its drawbacks. In this situation, a deliberate choice has to be made; my preference would

be to stick to the road taken by the ICRC, that is, to seek to achieve agreed texts by methods of quiet consultation and diplomatic negotiations, rather than have the matter transferred to the slightly noisier and decidedly less effective resolution-making machinery in New York.

The second area of disagreement concerns the emphasis to be placed, respectively, on procedures for a more satisfactory implementation of the existing law of armed conflicts, or on the adoption of new substantive improved rules. Whereas Hans Blix emphasized the need to develop the substantive aspects of the law in the first place, George Aldrich has been principally concerned with implementation procedures. Both tasks are equally important and, indeed, equally urgent; in fact, both elements have received equal emphasis in the ICRC proposals from the very beginning. George Aldrich laid particular stress on the need to have the Third Geneva Convention of 1949 (the Prisoners-of-War-Convention) faithfully implemented. I would point out that, as he himself mentioned, the existing law of armed conflict is not confined to the Geneva Conventions (let alone to the Third Convention). It also embraces the so-called law of the Hague, that is, the law of warfare proper which governs the conduct of hostilities. Of course, we are all agreed that this branch of the law of armed conflicts is in a situation of considerable distress, which is not surprising in view of the fact that its formulation for the most part dates back to 1899 and 1907. Accordingly, application of the law of warfare to present-day armed conflicts of necessity will amount to application of its basic principles rather than the detailed rules formulated so long ago. Yet, it is hard to deny that the need to live up to those principles is as great as the need to comply with the more recent Geneva Conventions.

Admittedly, implementing the law of the Hague poses different problems from implementing the existing Geneva Conventions. The conventions in this respect are based on a system of outside supervision by protecting powers or a substitute organization, and recent efforts in the lawmaking sphere have been aimed at achieving a more satisfactory (or, rather, a less unsatisfactory) operation of that system. With respect to the law of warfare proper, on the other hand, such organized outside supervision is hard to conceive, nor does any other adequate implementation machinery come readily to mind. In these circumstances, and for the time being, the "mobilisation of shame" may be the only reasonably effective device at hand.

The third main area of disagreement between the two speakers concerns the substance of the law of armed conflicts and, more particularly, the desirability and feasibility of introducing new rules on two specific subjects: the protection of the civilian population and the use of certain weapons.

As for the protection of the civilian population, the position taken by George Aldrich virtually amounts to acceptance of one principle only—that of proportionality. This would mean that the only protection the civilian population might expect would be against damage disproportionate to the military advantages sought by any given action. Such

a "development" of the law would not, however, be enough. Indeed, it would amount to a considerable reduction as compared to formerly accepted principles. Here I find myself completely on the side of Hans Blix.

What is necessary as a minimum is express prohibitions on attacks deliberately directed against the civilian population, on terror and reprisal attacks, and on deliberately indiscriminate attacks. All of these prohibitions will have to be worded very carefully. As for the last mentioned, Hans Blix seems to reject the idea that it should be confined to attacks that are intentionally indiscriminate in character, and he shows a certain preference for the language used in the military manual of the German Federal Republic. I would point out that, while the second half of the sentence which he quoted ("indiscriminately to attack or bombard") may suggest that deliberate indiscrimination is not required, the requirement of intent is unmistakably implied in the first half of the sentence where it "is forbidden to treat several military targets and living quarters between them as a single target." In my view, a formulation including the element of intent would be the better solution. Any rules formulated in this area will be used as the basis for accusations of violations of the law of armed conflicts, and it seems only right to restrict the possibility of such grave accusations to cases where there is evidence of deliberate intent.

With respect to weapons, the statement by George Aldrich to the effect that the use of napalm is generally considered lawful seems very much of an overstatement. The most one can say with certainty is that napalm has not thus far been made the subject of a specific prohibition, but obviously this does not in any way decide the issue of whether its use might be in contravention of a general rule such as the one prohibiting the use of weapons apt to cause superfluous injuries.

As far as other so-called "conventional" weapons are concerned, there is a wide gap between the two views expressed. According to Hans Blix, arriving at an agreed list of prohibited weapons, including many only recently developed, is not only an urgent necessity, but is also feasible. In the eyes of George Aldrich, such a list would be strictly limited in the first place, and even then it would be of little value as it would merely lead to new means being developed to replace the prohibited weapons. Therefore, his preference would be for a commitment by governments to demonstrate the admissibility of any new weapons developments; an idea already advocated in 1972 by the U.S. experts at the second session of the Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts.

I find myself somewhere halfway between the two speakers. With Hans Blix, I believe that agreement on a list of prohibited weapons is both urgently necessary and attainable. Unlike him, however, I feel that one cannot expect such a list to be particularly long, for the simple reason that there is undeniably an element of disarmament in this whole exercise. True, prohibitions in the sphere of conventional weapons

will not affect the balance of terror between the superpowers. Measures of qualitative disarmament, even though expressed in terms of prohibitions on the use of specific conventional weapons, are, however, apt to affect the military balance between a number of states, and they obviously will think twice about any proposed prohibitions in this field.

This is not to say that it would be necessary, or even desirable, to transfer the issue of prohibitions on the use of specific weapons to the disarmament forum. There is no need to do this, because the proposed prohibitions belong at least as much in the sphere of the law of warfare, with its balance between military necessity and the requirements of humanity, as in the area of disarmament law. There is no reason why a humanitarian law conference could not take account of the latter aspect as well. Moreover, the transfer would not be desirable because it would in all probability amount to an indefinite postponement of the matter.

That the list of prohibited weapons eventually might turn out to be comparatively short does not impress me as a particularly strong argument against it. The St. Petersburg Declaration listed only one item; it has nonetheless been very influential. The importance of an agreed list would lie not only in the items which it enumerates, but also in the principles of which it is evidence. In this respect, I would strongly advocate complementing the list of specific weapons with an unequivocal statement of the principles involved, such as the prohibitions on the use of weapons apt to cause superfluous injuries or which by their nature or normal use will have indiscriminate effects. Rules of that purport have been included by the ICRC in its recent proposals.

Finally, I would like to remark briefly on a completely different subject—one on which George Aldrich and Hans Blix found themselves in complete agreement. I have in mind the proposed new rules for the treatment of captured guerrilla fighters and the conditions on which they will be accorded prisoner-of-war treatment. It seems reasonable to expect that these conditions will be made less severe and, indeed, less impossible to fulfill, than those presently enumerated in Article 4 of the Prisoners-of-War Convention of 1949; and this modification is only to be welcomed as a long overdue improvement. Where I do not agree with the previous speakers, however, is in their expectation that the prospect of prisoner-of-war treatment might prove to be an important incentive for guerrillas to comply with the basic precepts of the law of armed conflicts. Men who join in guerrilla operations probably are strongly motivated by the cause they fight for, and they will more readily sacrifice everything than might be expected of a regular soldier. Under those conditions, I do not for a moment believe that the “carrot” of promised prisoner-of-war treatment could divert them from any action they consider desirable at a given moment, no matter how unlawful it might be. To my mind, compliance with the law will be determined by completely different factors, such as discipline and training and, above all, the advantages to be gained in terms of recognition by the outside world. Therefore, prisoner-of-war treatment should not be accorded guerrilla fighters so as to induce them to comply with the law, but because

they are human beings who have as much right to such humane treatment as any other participant in the fighting.

REMARKS BY JORDAN PAUST*

I have been asked to comment on the use of weapons in time of war or armed violence and to present some of the military viewpoints on the need for a continuation of the present efforts to regulate the use of weapons through general guiding principles rather than through a ban on specific weapons or a list theory. Why, it has been asked, is there some military opposition to the ban of specific weapons? I would like to make it clear that questions of weapons use are handled in a different manner than questions of weapons banishment and it is postulated that this is a key to the military viewpoint. I would also like to make it clear that the following views are my own and not necessarily those of the military profession or the U.S. Government.

First, it should be pointed out that general principles prohibit certain usages of any weapon, and that any weapon may be misused, *e.g.*, the misuse of an ordinary rifle at My Lai or at Duc Duc and Hué in the Vietnam context. Generally, states may utilize the most effective, otherwise lawful means of engaging armed combatants or military targets which result in the least amount of excess death, destruction, and suffering. This statement is taken from the 1868 St. Petersburg Declaration, the 1907 Hague Convention, the 1863 Lieber Code, and numerous documented expectations since World War I, such as those appearing in U.S. Army Field Manual 27-10 (paragraph 25).

To the military officer, this normative guidance provides as well a documentation of certain leadership principles, such as economy of force and precision of firepower. These principles also help us understand why there is a military interest in considering the question of weaponry usage under the general principles, as opposed to the specific ban, approach. I have five specific points to make in this regard:

(1) The general principle cited above provides a sufficient authoritative guide for command decisions in the fluid battle context when it is recognized that this principle is supplemented in the U.S. decisional process by more particularized normative expressions referred to as Rules of Engagement (ROE). They provide officers with the guidance needed in specific tactical situations. They are reviewed by the Judge Advocate General's Corps for compatibility with the international law of war and with rising expectations and demands. For example, they might prohibit the use of certain weapons on troops in the open and direct usage only on fortified positions.

(2) Certain weapons (such as napalm or fragmenting ordnance) and certain strategies, it is claimed, are extremely effective methods for the engagement of enemy combatants in certain battle contexts with the minimal loss of life and suffering to both types of combatants (the enemy

* Formerly on the Faculty of the U.S. Army Judge Advocate General School.

and your own troops, for which you as a commander are responsible) and noncombatants (which are commonly referred to as innocent civilians). This is, after all, the professional responsibility of the military officer who commands or gives input into targeting and strategy decisions. Furthermore, these weapons and strategies may be so effective as to decrease civilian deaths and suffering, and this has been recognized with regard to the usage of the new "smart" bombs. Even Sweden, which is a manufacturer of large quantities of napalm, has recognized its legitimacy and effectiveness as an antitank weapon during the Geneva Convention conferences (changing its position on this weapon from one advocating an absolute ban).

(3) The direct or intended attack on civilians or noncombatants *per se* is prohibited by international law and U.S. implementary ROE in all circumstances. There is no need to prohibit certain weapons to establish this principle of law. Sometimes intellectual confusion allows the perpetuation of the notion that certain weaponry is necessarily utilized in a battle context by U.S. forces to attack civilians directly. It is important to recognize that this is not the military position, nor is it mine.

(4) Given the rapid technological changes in weaponry, (we might note here the increased use of, or research into the use of, laser beams, smart bombs, sound weapons, orbiting weapon potentials, caltrops [spiked foot gear impediments]etc.) we might want to ask ourselves whether it is desirable to prohibit specific weapons now for the battles of the future. Since we cannot always predict context and technological change, the effort to ban specific weapons is an effort geared to the past. This points to the fundamental problem in international law and the normative regulation of weapons: the list theory of specific prohibition will almost certainly leave us unprotected against new weapons developments unless we focus on general community policies, particularized normative expectations of goal values, and the necessity of an approach to international law and weapons regulation based upon policy, phase, and value analyses with an integrated awareness of trends and alternatives. To restate the point, rules cannot protect us from ourselves or dictate humane results. It is not beneficial to attempt to protect humanity through the approach of a ban on specific weapons when technology and an awareness of contextual reality point to a rapid change of weaponry and battle contexts.

(5) Given the lack of a unified expectation in the international community on the legality of certain weapons, we might ask whether it would be feasible to formulate a list of prohibited weapons in the first place.

Viewing the attempts to update the Geneva Conventions, the military officer who is seeking to obtain guidance for command decisions on targeting, use of weapons in certain contexts, etc., is very concerned with the lack of documentation on certain weapons. By focusing on a ban on specific weapons, we could be instilling the wrong attitudes in the minds of certain officers in the field who have to implement this law.

In commenting on the paper by Mr. Blix, I would like to emphasize the fact that the laws of the Hague (which are customary) and Article 2 of the Geneva Conventions (the jurisdictional article) *do* govern civil wars between "belligerents." Moreover, I agree with Professor Taylor that the present law of armed conflict was developed with a long history of the guerilla experience in mind and does not ignore the needs of guerilla warfare. The present precepts were developed to serve all participants and the community goal values in such contexts. The requirements under the law for POW status are designed to serve those values by requiring combatants to distinguish themselves during hostilities from the rest of the population. In no other way can noncombatants be assured of protection or can the uniformed forces direct their firepower so as to engage the proper targets by making a distinction between combatants and noncombatants in the battle context. The military officer would agree with Mr. Aldrich and Mr. Blix that implementation of the dynamic law is far more important than drafting new rules, which is jurisprudentially merely an *ad hoc* approach to normative guidance on such questions as: Who is entitled to protection, in what context, and with what protection?

REMARKS BY ALFRED RUBIN*

Mr. Blix's figures indicating that it is safer to be a soldier than a civilian are more than borne out by the irony of Mr. Aldrich's observation with regard to the treatment of captured guerillas as if they were prisoners of war. It seems to me that we are returning to an age of chivalry where soldiers are treated a lot better than civilians even if those soldiers happen to be concealing their weapons, bearing no visible signs, and are captured while shooting at you. You may remember that the age of chivalry was an age of caste; you were very nice to the soldiers but not so nice to the peasants. That is very much what seems to be happening today.

Mr. Blix remarked that no conventional weapon has been banned since the dum dum bullet. That, of course, is a slip. In the 1921-22 Naval Conference, it was decided to ban certain forms of submarine warfare and punish the perpetrators "as if for an act of piracy." This was confirmed at a 1930 conference and expanded further in a 1936 Protocol which forbids the sinking of ships without giving passengers and crew a chance to get off. The effect of this was to ban the sort of submarine warfare which was conducted by Admiral Nimitz as soon as the United States entered World War II. Admiral Nimitz was never tried as a war criminal; and, although two German admirals were nominally convicted of waging illegal submarine warfare, they were in fact not sentenced for that particular offense.

Mr. Blix's oversight was more than understandable. The mobilization of public opinion with a whoop and a holler to bring an era of humane warfare is deceitful; when one prohibits weapons in circumstances where the temptation to use them is going to be so overwhelming, the prohibi-

* University of Oregon School of Law

tion is, in fact, worthless. The mobilized public opinion demands that its own military overturn the decision. I cannot imagine the American public in 1941 and 1942 actually being bothered by Admiral Nimitz's orders to sink Japanese vessels without giving the crew members or passengers opportunity to disembark.

If one pursues this line a bit further and worries a bit about dum dum bullets, it seems to me that, despite the reiteration in the U.S. manual regarding dum dum bullets and some other sorts of illegal weaponry, the procedures set up by the United States for legal review of new weapons (which I understand are indeed in effect) provide generally that, as long as there is a supportable military necessity for using a particular weapons system, a scintilla of military necessity will outweigh the ton of avoidable harm the weapon might cause. This does not mean that you can smear poison on weapons, but if, for example, you have something that we call fleshettes, which are very effective at some distances and perfectly humane in killing or maiming somebody, while at other distances they are rather less humane at putting someone out of action, nonetheless the fact that they might be useful at some distances means that they get military clearance. At the slightly wrong range, fleshettes operate rather like dum dum bullets.

From this, I conclude that, Mr. Paust's suggestion notwithstanding, or perhaps in confirmation of it, the attempt to ban weapons by drawing up lists results in fact in banning only the weapons that you had the foresight to put on the list and provokes, instead, the development of another, equivalent weapon that you did *not* put on the list because you had not developed it at the time the list was drawn up. Fleshettes may be called a sort of dum dum bullet but, on the other hand, we are lawyers and we know that one attaches labels with a policy in the back of one's mind, rather than because compelled by incontrovertible fact.

Public diplomacy may have some appropriateness in broadening bans on weapons, on warfare, or on types of warfare. However, I entirely concur with the reservations expressed regarding the effectiveness of public protest and the quixotic reversals of public opinion in some cases. I would, instead, talk about the publication of the governments' positions concerning the breaches of the existing Geneva Conventions. It seems to me that the reason Mr. Aldrich apparently prefers at this point to emphasize the enforcement of existing rules is that those rules rather favor the kind of warfare that the United States is good at to the disadvantage of the kinds of enemies that it might be called upon to fight. At the same time, when itself confronted with a breach of obligation under the Geneva Conventions or Hague Rules, the United States privately points out that its unique position disqualifies it and that its position as an arms supplier enables it to exercise quiet diplomacy to tone things down.

Mr. Blix favors expanding the rules, I suspect, because Sweden's record on demanding enforcement of the existing rules is almost as bad as the American record, and for not nearly as easily stated reasons. In fact, I would wonder—knowing the answer already—why did Sweden, a party to the 1949 Conventions, not protest to Pakistan that what it was

doing in Bangladesh was in apparent violation of Article 3? Why did Sweden not protest to India with regard to the Pakistani prisoners of war? To whom, in fact, has Sweden ever protested other than to the United States?

The effect of one-sided protest is not to mobilize public opinion towards a reaffirmation and expansion of the rule of law in armed conflict but, instead, to breed the very cynicism that seems to be deplored here. Of course, if you condemn one side and not the other, you are reducing the rules of law to things to be applied to suit your own political needs. You condemn one side rather than the other because you prefer the aims of one side over the other, or you are jealous of one, or you identify with one.

Finally, it seems to me that the propensity to express these charges to the *general* community rather than restricting debate to the *legal* community reflects an assumption that the world community is peaceful or, at least, generally inclined to favor humanitarian concerns in time of armed conflict. Both speakers seem to be rather optimistic about the possibilities of improving the law, perhaps of improving enforcement by one means or another, particularly by expanding the audience which may be acquainted with the law. I must confess to a certain amount of pessimism on these points. To my mind, public opinion is much more likely to demand the punishment of the unpopular, than the punishment of the malefactor.

REPLY BY HANS BLIX:

I do not know of very many governments who have protested to the government of India concerning the treatment and detention of its prisoners. On the whole, and this may be an explanation of some of the attitudes reflected by my government, public opinion in my country is very concerned about armed conflict. This was true of the conflicts in Biafra and Bangladesh, and it is certainly very true of the conflict in Vietnam. When the government speaks up, as it frequently does, this reflects an attitude held by a strong public opinion, nothing very peculiar in a democratic state. It is natural that this may sometimes lead to controversies with foreign countries that do not wish to hear all that is said.

In the effort to modernize the law of armed conflicts, I have continually taken the view, and have persuaded my own government to act on the principle, that it is wiser not to drag in concrete conflicts. In discussions among governments, it tends to become counterproductive to allude to such concrete examples because it simply provokes the other fellow into taking a defensive stand. Of course, one cannot divorce one's suggestions for reform from a knowledge of what is going on.

In addition to this, I simply do not think the approach of retaining very general principles is enough, whether it be general principles on provisional use of weapons causing unnecessary suffering, or a general principle on proportionality. What we have seen in conflicts, not only

in Vietnam but in World War II and other conflicts, all goes to show that those general guidelines which the commanders may wish to have and which may give them many options actually produce unsatisfactory results in warfare. This is the reason we are urging rules concerning the immunity of specific targets, *e.g.*, the question of crop destruction. It is no argument that a list of specifically banned weapons will be obsolete in a few years. As new weapons will be developed, we may revise the list.

George Aldrich also said that general conferences were not a satisfactory forum for discussing these matters. We should not be discouraged that states which do not have certain weapons will vote to ratify the prohibition of such weapons. Looking at the U.S. instructions before the Hague Conference, one finds that they had a brief which was very negative concerning the prohibition of specific weapons use and that, at least to begin with, the United States did not ratify the convention against the use of dum dum bullets. In the long run, that principle has been generally accepted, as evidenced by the U.S. manual. Therefore, we are not discouraged, and a frank and public discussion at a world conference would be a good basis upon which to work out bans on specific weapons.

On the point made by Mr. Paust, I think that it is true that all weapons can be used indiscriminately, but there are some weapons which by their very nature, or intended use, or normal use, are indiscriminate. Take automatic, unanchored, contact mines; they are by their nature indiscriminate and were accordingly banned in the Hague Convention. There are weapons today to which one could draw clear parallels. Take the letter-bombs, which are spread by the thousands; they are also by their nature indiscriminate. The high-velocity bullet of today has a similar effect, because of speed not of shape, to that of the dum dum bullet in shattering in the recipient's body. My conclusion is that a list is desirable. What elements it would contain we do not know. Frits Kalshoven was somewhat pessimistic about how many weapons could be put on such a list.

My first objective is to attain a public discussion of these subjects at the UN and the ICRC. So far, our opponents have said that they simply do not wish to discuss it. They have referred to the disarmament conference, but we do not know how serious these proposals are. In that forum, the weapons proposals here under discussion might simply be swept under the carpet. Perhaps this is a reason that we wish for more public engagement in the decisionmaking process. We doubt that the public in most of the Western democracies would support a position that these subjects be swept aside. We are inclined to believe that the public would at least want a thorough hearing on the matter.

At this point, the discussion was opened to questions and comments from the floor.

In response to a comment from the floor on the incongruity between the enthusiasm and leadership provided by the United States Government with respect to "micro-terrorism" and its less than vanguard position with respect to "macro-terrorism," Mr. ALDRICH explained that it was

difficult in a 20-minute statement to give an adequate description of all the concerns of the U.S. Government. He had attempted to anticipate the argument in Mr. Blix's position that if you do not achieve bans on target-area bombardment and a few other such things, you have had an unsuccessful conference. There are many other important points that are more achievable, which does not imply that it is unimportant to restrain the air warfare which broke loose with World War II and which we have found impossible thus far to put back into the bottle. On the latter issue, it is important that we first understand the nature of the problem and then move from there to the development of workable formulae that have a chance of being accepted by countries that rely on air forces and high fire power.

Replying to a question concerning the possibility of some sort of standing institution, some sort of ombudsman organization, which could serve as an inspector of possible violations of the laws of war, Mr. BLIX remarked that the question of an institution that would continuously keep an eye on the implementation of the laws of war has been touched upon a number of times in discussions of both the ICRC and UN. The Swedish Government has suggested that the mechanism could be some kind of committee under the UN. But the groundswell of support for such a suggestion has been conspicuously lacking and thus no formal proposal has been submitted. No significant group of governments has yet come forward to support this idea. The U.S. Government is not willing to move beyond the position of sanctioning the institution of protecting power. In Mr. KALSHOVEN's view the real problem was not the question of enforcement. Rather, it was how to instruct your military and your civilians to indoctrinate them with the principles of the humanitarian approach. That is where you have to begin and that is where you have to expect results.

In response to a comment on his previous statement on the "legality" of napalm, Mr. ALDRICH explained that he had been talking about the question of the legality of the weapon *per se*. He was not opposed to the idea of trying to develop some kind of restrictions on the ways weapons can be used—for example, restrictions on areas where there are many civilians. He considered this a question of discrimination and proportionality, not a question of whether the weapon itself is legal or illegal.

The point was made that effective education in the field on the rules of war required that the relevant principles be formulated in a very simple and understandable fashion. Mr. KALSHOVEN stated that he was pleased to note that the Federal Republic of Germany had succeeded in breaking down these complicated conventions into comprehensible parts which can be put before even the most simple soldier. It was further noted that the United States and the ICRC have also done this.

STEFAN LOPATKIEWICZ
Reporter

ENDING WORLD WAR II: TOWARD A FINAL SETTLEMENT IN EUROPE

The panel convened at 8:45 p.m. April 13, 1973, Mr. Charles Brower* presiding. The CHAIRMAN explained that the exact phrasing of the title of the panel might not reflect the discussion, as the panel questioned the worth of a backward look at World War II when the present developments in Europe and their effect on the future are so vital.

REMARKS BY CARL JACOBSEN**

With respect to my subject, Soviet perspectives on European Security, the first point to be made concerns the Soviet concept of strategy. It is far more explicitly comprehensive than most Western conceptions. It stresses the interrelations and interdependencies of military, economic, ideological, cultural and other factors, and sees politics as the umbrella composite of these factors. Furthermore, the composite is not only comprehensive in nature it is equally comprehensive in extent. Thus the Soviet view does not allow for any isolated consideration of, for example, Central Europe, whatever the character of the concern at hand. The topic of local military asymmetry, which is related to the discussions on multiple and balanced forced reductions (MBFR), may serve as an example. The USSR stresses not only the more complex nature of the problem in Central Europe, but also insists that it must be viewed in a wider continental, and even global, context. Europe is not seen in isolation.

The cornerstone of contemporary Soviet perspectives lies in their effecting of rough strategic parity with the United States. In military terms the world was *effectively* unipolar until the mid-1960's. Only then could the USSR rest confident in the guaranteed viability of its second strike capabilities. Only then could the USSR be said to have offset the U.S. potential to strike against it. The latter 1960's saw the securing of this confidence, with the buildup of such supplementary and complementary force components as might also offset or parallel the global policy of the United States of initiating options.

SALT I was valued as a confirmation of parity, as a recognition of its founding cement of mutually offsetting second strike capabilities, and as implicit acknowledgement of Soviet ability to perpetuate the balance. But SALT I not only guaranteed mutual vulnerability, and therefore invulnerability, as between the superpowers; it also ratified their preeminence of power vis-à-vis other nations.

While some Western commentators see the ABM (anti-ballistic missile) accord as implicitly conceding penetration prospects of third powers (China, etc), the USSR does not. To the contrary: it sees the established

* Acting Legal Adviser, U.S. Department of State.

** Carleton University.

limits as providing sufficient protection against the existing and imminent, crude, and first-generational strategic facilities of third powers. And the USSR is energetically pursuing BMD (ballistic missile defense) research, in the expectation that future third-power capabilities can also be offset. In fact, if the day should come when the BMD accord stipulations really constrain Soviet ability to offset third-power capabilities, the USSR would most probably demand a corresponding relaxation of the stipulations—at least as long as it retains faith in BMD prospects. The USSR expects that the reality of really effective third-power capabilities would make the United States amenable to the requisite compromises.

But if the cornerstone of Soviet perspectives lies in new-found strategic confidence, the supporting pillar in the case of Europe lies in the consolidation of the Soviet position in East Europe. It is clear that a large proportion of the East European populace today accepts a degree of Soviet tutelage: some through conviction; some through bribery; perhaps most through apathy—a pervasive quality—or resignation. Soviet tolerance of independent East European policy initiatives reflects not weakness, but confidence and the fact that the independent policy initiatives are not such as to jeopardize Soviet interests. In the postwar era repression and enforced conformity were necessary for control; that is no longer so.

The more general East European acquiescence to Soviet tutelage, encouraged and complemented by a more sophisticated Soviet approach to control requirements, adds a dimension of security which could not previously have been ascribed to the Soviet position in East Europe. And this security is, of course, further enhanced by the described strategic confidence. Not only does the USSR have the capacity to intervene physically whenever it considers it essential, but it can now do so without undue risk and in the knowledge that East European majorities recognize and are resigned to this state of affairs. Hence the factor of resignation reinforces and supplements the more positive rationales binding East Europe to the USSR.

Yet the positing of secure Soviet predominance in East Europe should not be seen as encouraging further Soviet aggression in West Europe. The Soviet announcement in favor of mutual and balanced force reductions, at a time when the U.S. Congress appeared bent on unilateral American withdrawals from Europe, added credibility to Nixon's postulate that balanced reductions would result, if only their intent was not unilaterally preempted; the narrow defeat of the Mansfield amendment could well be credited to the unexpected Soviet intervention. Soviet motives are logically explained by (a) a conviction that U.S. forces in Europe are militarily irrelevant; (b) an appreciation of a U.S. force presence in Europe as the most visible military-political symbol of U.S. power, a symbol of real cohesive value in East Europe; and (c) an absolute disinclination to be responsible for Western Europe at this time. Such disinclination is a logical corollary of their intervention. Its existence is furthermore confirmed by a variety of other data and lines of analyses.

One of the more interesting of these is that of disillusioned West European Marxists. They point to Spain, where the anti-Franco front

was defeated not so much by the enemy as by internecine warfare, initiated by the Moscow-controlled Communist Party against their Trotskyite, pure-Marxist, and anarchist allies when it became apparent that the latter were achieving a position of considerable influence and control. They furthermore point to France of 1968; they not only assert that the revolution had succeeded, but claim that what they see as the counter-revolution only succeeded because the Communist trade union refused to view the situation as "ripe" and permitted continued electricity, water, and other supply deliveries to the army. The contention is that Moscow prefers an explicitly capitalist regime to one dominated by left-wing elements not under its control, *i.e.*, left-wing elements which it suspects might derail "the historical process." The argument is quite compelling when fully presented. And it would seem to find indirect confirmation in the fact that Soviet officialdom deals far more leniently with domestic bourgeois-type opposition, than it does with domestic opposition from the left. (Where a liberal conservative might be sentenced to two years, a Marxist left of the Communist Party might get 20 years for the same type of offense.)

But, to return to the topic at hand: Soviet security prerequisites have been satisfied. The USSR has acquired a degree of confidence previously unknown to it. Why not, then, indulge the secondary concerns of increased trade, improved political image, etc., associated with detente. Detente today presents minimal risks to the USSR, while promising to facilitate further progress.

Soviet flexibility and interest in detente is not a reflection of weakness, but rather of new-found strength and confidence and of the satisfaction of its basic perceived needs.

The USSR is certainly not immune from the guns and butter quandary. But although the financial squeeze was immeasurably more severe in earlier decades, it was nevertheless ignored, at least to the extent that it was never allowed to sabotage strategic necessities and priorities. And if that squeeze could be tolerated, there can be no doubt about the Soviet ability today to sustain any military expenditures that might be deemed necessary.

The Soviet economy is not stagnant. The desire for Western inputs is not indicative of despair but rather of a determination to implement as many shortcuts as possible in order to increase the rate of growth. Such shortcuts were previously regarded as too hazardous because of the general condition of Soviet insecurity and strategic weakness. That they and their implications are now regarded with equanimity is a tribute to the state of confidence now prevailing in Moscow.

REMARKS BY DAVID CALLEO*

Recent years have been witnessing a complex series of negotiations to reach that European political settlement which eluded the victors after World War II, the absence of which prompted the Cold War that

* School of Advanced International Studies, The Johns Hopkins University.

followed. More important than the particular negotiations themselves, certain forces have started in motion which are likely to alter considerably the postwar political landscape. No one can say with great assurance what sort of world these trends will lead to. None is free from ambiguity; all have aroused strong countertrends which may well reverse them. Nevertheless, taken together, they do furnish at least a working model for considering Europe's likely shape in the future.

These trends are briefly as follows:

- (1) A general strategic detente between the two superpowers;
- (2) The formal acceptance by the West of the legitimacy of the Communist regimes in Eastern Europe and, by implication, of Russia's hegemony in Eastern Europe;
- (3) The formal acceptance by West Germany of the legitimate existence of a separate East German state;
- (4) The consolidation of Western Europe into an economic, political, and perhaps military bloc;
- (5) The disengagement of the Western European bloc from American hegemony.

It might be useful to take up each of these trends in turn.

Detente—a general Russian-American strategic rapprochement—is hardly a new phenomenon, although such agreements as the Non-Proliferation Treaty and SALT have brought the understandings to a new degree of formality. Many, of course, still doubt the durability of superpower detente, even at the level of strategic nuclear weapons. New developments may upset the political balance. American attempts to reach closer relations with China might, for example, sharply increase the tensions between the superpowers. Even now, both superpowers clearly continue to see themselves in competition in conventional diplomatic and military terms in many parts of the globe—the Near and Middle East most obviously. In Europe, however, their relations have long been stable.

Superpower detente has several effects on Europe. It lessens European fears of Soviet military aggressiveness; it also raises doubts about the need and reliability of American nuclear protection. And it stimulates fears of a Soviet-American duopoly over a permanently divided Europe. To avoid becoming merely the objects of superpower diplomacy, Western European governments have for several years carried on a diplomatic offensive of their own. By pursuing closer relations with Russia and the Eastern European states, the Western Europeans have sought their own special pan-European detente, distinct from the special relationship of the two superpowers. Hence, the second of our trends—the legitimization of communism and Russian hegemony in Eastern Europe. This trend, like the superpower detente to which it is closely related, is hardly new. But with Brandt's *Ostpolitik*, Western acquiescence has become far more explicit and formal than ever before.

Where does this trend lead? Is it really the cementing of the status quo, or the beginning of its unravelling? Neither Western European

intentions nor the likely outcome of their recognition of the East can be unambiguous. Since the Soviet invasion of Czechoslovakia in 1968, Western European powers have been careful not to seem to be using detente as a cover for subverting Russia's position in Eastern Europe. Nevertheless, detente inevitably promotes a proliferation of economic, cultural, and political connections. No one can predict the long-range consequences.

This general ambiguity is, of course, particularly characteristic of West Germany's acceptance of East Germany. Even if Bonn's present intentions are essentially conservative, no one can predict the long-range revisionist consequences of closer Western relations with the DDR. Moreover, the Berlin settlement, imposed by the four conquerors, while a considerable practical improvement over the earlier state of affairs, remains without a genuinely stable political foundation.

The inherent ambiguity of Germany's policy toward the East extends, for that matter, to its policy toward the West. Germany has sought to pursue simultaneously Atlantic partnership, Western European integration, and Eastern reconciliation. Considerable tension inevitably must exist among these policies, in particular as each reaches a more advanced stage. While detente may for the moment harmonize the Federal Republic's Eastern policy with its Atlantic policy, the tension between Germany's European and Atlantic orientations has been growing more acute in the economic sphere.

Like Britain, Germany has been reluctant to commit itself to any one of its grand options. None by itself is satisfactory. Atlanticism, that is to say a close dependent relationship with the United States, appears to offer protection against Soviet threats or radical domestic disruptions but it gives little prospect of German reunification. Neither Russia nor the United States, particularly in a time of increasing cooperation with each other, has any interest in disrupting the European status quo by reuniting Germany.

Germany's second grand option lies in a sort of nationalist neutralism, the policy proposed by the socialists until the end of the 1950's. An ideologically and militarily neutral Germany might expect to achieve reunification, and perhaps even become the patron of a central European neutral bloc. Some observers believe this old idea of a neutral *Mitteleuropa* lies behind Brandt's *Ostpolitik*. Atlanticism is merely a temporary cover. There is, of course, nothing wicked in such an idea. Germany has as much right to pursue its national interest as anyone else. And no one ought to expect the Germans to acquiesce without a struggle in the permanent brutal separation of their nation. But a neutralist policy, if carried far enough, would presumably wreck Western European integration and, insofar as it succeeded, recreate the old German problem in the heart of Europe.

Joining in a Western European bloc remains the third major option. De Gaulle tried to tear this option from its original Atlanticist orientation and endow it with an enterprising Eastern policy. The Western European states themselves were to become a powerful bloc between the super-

powers. With Germany contained within a close alliance with France and Britain, and all of them disengaged from American hegemony, if not alliance, Russia was to be coaxed into a balanced pan-European system—a sufficiently stable framework, de Gaulle hoped, to contain some form of German union and perhaps even to permit Russia to disengage from a costly imperial role in Eastern Europe. De Gaulle's option ultimately depends upon whether Western Europe can form a sufficiently cohesive bloc to float comfortably between the superpowers. What are the prospects of such a bloc?

At the present time, according to our fourth trend, a strong common impulse inclines the major European powers to consolidate and extend their economic cooperation. In particular, they are moving toward some form of a monetary union. If effective, such a union would require substantial coordination of domestic policies and, more significantly, perhaps, a common approach to economic policy toward the United States and Japan. What are the forces which seem to push Europe into such a monetary bloc? Opposition to dollar hegemony seems the principal incentive at the moment. By dollar hegemony I mean our capacity, in the present world monetary order, to run balance-of-payments deficits free from most of the restraints which compel other countries to stay in balance. With these deficits, we finance, in addition to a trade deficit, our military extensions into the outside world plus the formidable outpouring of capital for investment abroad, much of it by American corporations in Europe.

Europeans have grown weary of this system for a variety of reasons. Some, of course, are political. They don't like what American military forces are doing in some parts of the world, or they don't like their industries controlled by Americans. Mostly, they resent having to finance these activities by accumulating more and more dollars in their reserves. Above all, they want a monetary union among themselves because many Europeans believe that without it they will increasingly lose the capacity to assert control over their own national economic environments. Domestic stability in Europe seems increasingly threatened by inflation, which they blame on American deficits and the Eurodollar market.

Still, if the Europeans do away with the dollar hegemony, which they fear, they may well do away with the military hegemony, that is, our military protection, to which they still cling. By ending the American capacity to run unlimited deficits, Europe may bring a drastic reduction in American external military installations. None of the European powers, France included, seems willing to make serious efforts at European defense coordination. At the same time, our role as military protector gives us great leverage in economic matters and increasingly impinges on Europe's efforts at monetary union. American influence, falling unevenly on different European countries, tends to reinforce other conflicts of interest among them. In particular, West Germany finds itself increasingly torn between the demands of European cooperation and the Atlantic alliance. In other words, the achievement of Western Euro-

pean integration seems increasingly to imply a Western European disengagement from American hegemony, not merely in the economic and political spheres, but in the military as well. Thus our fourth trend, European unity, seems to imply, and indeed depend on our fifth, transatlantic disengagement.

All of this has become embarrassingly clear in transatlantic economic relations. It has become commonplace now to say that detente has downgraded military relations and upgraded economic questions. But economic questions divide the West.

What is fascinating for the historian in this period is to see how many of the problems of the interwar period are reappearing. At issue is not merely whether American economic and military hegemony can survive the revival of Europe and Japan, but whether the whole postwar liberal "interdependent" economic system itself will survive. Are we to go back to that breakdown in economic and political relations among the capitalist powers, that breakdown which, after all, led to that World War II which we have yet to settle? My own view is that a liberal international system, such as we have enjoyed in this postwar era, cannot survive without hegemony, if the "interdependence" which it brings causes excessive disruption of individual national political economies. The present pan-Atlantic system is, in my view, excessively disruptive and, given America's declining hegemony, will collapse unless national governments can stop the steady erosion of their power over national economic environments. They can stop that erosion, and reestablish their control, only if there is a relative disengagement between Europe and the United States. But that disengagement will ultimately demand, as I argue above, a greater degree of European cooperation and self-reliance in the military sphere than Europeans have been eager to undertake, or we to encourage.

Where do these trends lead? If we put them together—superpower detente; mutual acceptance and reconciliation of Europe's divided spheres, including the two Germanies; and a Western European bloc somewhat disengaged from its close American ties—it is not difficult to imagine a reasonable and cheerful evolution of European and Atlantic affairs. But it will not, I am afraid, be as easy as all that.

We cannot be certain even that superpower detente will persist. Nor can we predict with complete confidence that closer relations between the East and West of Europe, or East and West Germany in particular, will be sufficiently stable and unthreatening to permit peaceful cooperation to persist and develop. Above all, we cannot take for granted a satisfactory readjustment of relations among the Western powers themselves. There are too many interests and ideas in this country which will try to hang on to the old transatlantic order. They will not save it, but they may prevent any reasonable alternative. Historically, periods like the present prove extremely dangerous. Where an old order is not strong enough to carry on, and a new system not strong enough to impose itself, the result is often breakdown and chaos. Those who

have worked so hard to prevent the rational and timely devolution of America's unnatural hegemony over Western Europe may ultimately have a good deal to answer for.

REMARKS BY RUTH C. LAWSON*

It pleases me that the emphasis in this discussion has shifted from what I thought was going to be both a backward and static look, to a more dynamic contemplation of the European scene. I don't know what the title of the panel is now. The Chairman repudiated that of ending World War II and moving toward a "final" European settlement and for this I'm glad.

There is clearly considerable current restlessness on the part of many with the arrangements that have evolved in Europe during the past twenty-eight years. It must be recalled, however, that without formal termination of World War II by means that international lawyers have traditionally admired, these arrangements have nevertheless kept Europe at peace for longer than the period between World Wars I and II. Twenty-eight years after 1918 World War II had ceased. Those who argue for change are, in my view, consequently burdened with making a case for the shifts they would like to see occur.

It should be emphasized that the current mobility in Europe is not concerned with the so-called "settlement" of World War II as it affected that Continent, but rather with the possible "settlement" of the Cold War as it has affected Europe. Discussion really entails examination of a process which does not align former allies against former enemies, but rather seeks accommodation and new relationships among Cold War adversaries.

In such a discussion the meaning of "Europe" may be ambiguous. In an attempt at precision, I shall use "Western Europe" to refer to the Community and "Eastern Europe" to refer to Warsaw Pact members excluding the Soviet Union. Moreover, importantly active in the diplomacy currently under way is the rather substantial number of European states that consider themselves "neutral" or, more accurately, non-aligned.

Among all those involved there is no expectation of some short-run "settlement." Rather, there has been set in motion long-term negotiations through stages perhaps crudely perceived but frequently articulated: from confrontation to detente in which interactions occur among former adversaries; to entente, that is, to some kind of contractual relationships legalizing agreements, if any should emerge from this period of interaction; and possibly, in the thinking of many, to interpenetration or convergence of the European systems. We speak, therefore, in the context of a very long-run perspective and we should realize that we are turning the corner from the fairly consistent policies, which both sides have maintained in respect of Europe in the Cold War period, to something that obviously will be replete with surprises.

* Mount Holyoke College.

There is a kind of parochialism in the European concern and preoccupation with Europe. It has been repeatedly pointed out that the intractable long-run issues of mounting concern are basically global in scope: the issues of world peace, of economic well-being, of human rights, of relations between the developed North and the developing South, and of the quality of the environment. These issues are not going to be resolved in Europe. Furthermore, many of the more immediate issues we face are not rooted in relations between East and West Europe. For example, the revising of commercial and monetary arrangements concluded following World War II is not a European problem. It is a problem, and here I agree with Mr. Calleo, that is already causing very serious differences between the United States and its European allies, and a problem in the resolution of which Japan must play a part while the East European role is peripheral.

In the movement away from certain characteristic features of Europe in the Cold War period, political processes are assuming a new importance in East-West relations and internally within East and West Europe respectively. This being so, I should like to focus attention on a fundamental question: Can these processes be expected to result in the creation of new legal arrangements and institutions among European states, institutions that will in turn provide a new setting for subsequent political dialogue? I raise this question as supplementary to what the two speakers have said or not said concerning permanent international institutions.

Two general observations should be kept in mind concerning the institutionalization of international relations so evident in our time. The first is the obvious indispensability of institutions and consequently of the legal arrangements establishing them and defining their functions and procedures. The reasons for this are relevant to an appraisal of contemporary developments in Europe. A principal cause is the increasing multilateralization of many international problems. A second factor is the complexity of many of the issues in interstate relations. This complexity places a high priority on the work of technicians. Thirdly, international institutions regularize opportunities for peaceful contacts on the part of former adversaries. Finally and perhaps most importantly, permanent institutions make possible protracted negotiations on problems that have become multilateralized and are complex. They make it possible to search for agreement, to interpret and re-interpret agreements that have been reached, and have utility even in the staving off of agreements by providing a stage on which acceptable political maneuvers can take place. In this we see the emergence of something like intrastate policymaking processes in which cooperative and adversary forces contend and compromise. We clearly live in a world, as well as in regions, where the institutionalization of diplomacy and of international policymaking is a characteristic trend.

A second general observation is that institutions both in their establishment and functioning are necessarily rooted in the shared goals of their creators and participants. If we look at international institutions, it is

apparent that goals are generally expressed in the broadest of terms. Subsequently, various interpretations may lead to a diminished sense of community as time passes. Or participation in multifunctional institutions may result in converging interpretations of goals, enhancing awareness of common interests, and the growth of community consciousness.

The Helsinki negotiations concerning the forthcoming Conference on Security and Cooperation in Europe provide the broadest perspective on what many hope may become a new Europe. The negotiations engage the attention of the largest number of concerned participants, Western and Eastern and nonaligned European states as well as the United States, Canada, and the Soviet Union, thirty-five in all. Of such a major and potentially significant enterprise it is reasonable to ask: Does the agenda reportedly agreed upon for the July foreign ministers' meeting reflect shared goals and can the mobility discernible in Europe be reasonably expected to result in new institutional arrangements?

Concerning cooperation in the spheres of economic affairs, science and technology, and the environment, collectively one of the three major areas for discussion, it can be argued that mutual advantages are perceivable by all concerned. It is reasonable to expect, therefore, that various arrangements may be institutionalized in respect of trade, the exchange of information concerning industrial cooperation, and the developing of raw material and energy sources, for example. A promising existing model, capable of development, is the United Nations Economic Commission for Europe.

If one looks at another cluster of agenda items, those concerning cooperation in humanitarian and other spheres, *e.g.*, cultural and educational exchanges, the wider dissemination of information, freer personal and professional travel, it is clear that there remain different perceptions rooted in the different value systems underlying the different political and social arrangements in East and West Europe. It is more difficult to foresee movement here. No fundamental changes should be expected, although some regularization of relations may emerge.

Security is the agenda item which triggered these negotiations although for many years it had deterred the NATO allies inasmuch as the Soviet Union had initially favored the objective of an all-European collective security system to replace NATO and the Warsaw Pact. Is there a shared concern for peace, meaning the absence of hostilities, on the part of all participants? Probably there is. But if one asks, is there agreement on the commitments and institutions requisite for peace in this sense, the answer might be very different. And if one goes on to ask, do all participants share a commitment to nonintervention, not only forceful but also political, as a method of maintaining or modifying political systems, the answer is provided by the experience of recent years. It is not surprising that on security questions the Helsinki agenda focusses attention on the formulation of fundamental principles to be respected and applied by all participants in order to assure peace and security in their mutual relations. Incidentally, most of the states engaged in the Helsinki talks have as UN members already accepted such principles.

Such other security proposals as advance notice of major military movements and an exchange of NATO and Warsaw Pact observers during military maneuvers may, if adopted, strengthen confidence and increase stability. All fall short of institutionalizing all-European security arrangements.

It should be noted that the agreed upon procedures envisage a series of commissions and sub-commissions to develop detailed proposals on all these matters following the foreign ministers' meeting. This obviously reflects shared perceptions of the desirability of ongoing talks. Actually, the Conference on Security and Cooperation and the MBFR talks also are institutionalizing negotiations concerning security and cooperation in Europe. In the short run this may be the most that is foreseeable as Europe struggles to move from arrangements of power to arrangements of law. Gertrude Stein is reported to have commented in response to a question about her birthplace, "There is no there there." For some time to come there may be no there there in respect of an all-European system. This does not exclude the possibility that we may be on the march from here to there.

REMARKS BY ARTHUR DOWNEY *

I think Professor Jacobsen's analysis of the unity, the comprehensiveness of the forward movement of Soviet policy and its military, diplomatic, political, economic, cultural advance may be quite true, but I wonder if we are not really only talking about a difference in degree from the U.S. system. I think the fact that Soviet policy is conceived of as a web, and that individual geographic areas or political, military, economic issues are not viewed or treated in isolation, is a concept or a method of conducting policy that is not peculiar to the Soviet Union. We have the same thing, with perhaps only a slight difference in degree as a result in part of the ability of the Soviet system to centralize.

Regarding Soviet confidence, I am not sure I agree with Professor Jacobsen's remarks that Soviet acceptance of new independent moves or elements of independence by Eastern European nations is a sign of their confidence and their strength. I think it is a sign of their maturity and also a sign of their weakness; it is certainly not a reflection of their strength. It also depends very much upon which nations of Eastern Europe one is talking about. They may be able to act or react in Poland, Czechoslovakia, East Germany, and Hungary with less concern for security issues than they would in Yugoslavia and Romania. The suggestion that detente, in Europe at least, poses minimal risks to the Soviet Union is also, I think, not quite accurate. As I would state it, detente poses acceptable risks to the Soviet Union; the risks are high, but acceptable, not minimal.

As to whether Soviet interest in trade with the United States and Western Europe is or is not a reflection of their weakness, or of their need for the benefits of this trade, I think it depends on what aspects

* Of the District of Columbia Bar.

of trade one is speaking of. They need Western high technology, manufacturing technology especially; they saw the gap was ever widening in computer areas, and they have positive needs in this area. They did not need many of the other aspects of the trade and intercourse that they are engaged in, but they must swallow the other to get this.

To my mind, as opposed to Professor Calleo's position, diplomatic offensives by the Western European nations toward the East have not been a fairly constant element in the political structure in Europe. It seems to me that this movement is a rather late arrival on the scene. De Gaulle, yes, but only in the mid-1960's did one feel any kind of West German moves toward the East, and the other actors had done very little. I concur with the comment that the Berlin agreement is really not the long-term, stable, dampening-down of the problem. It is the best we could get, and it is useful.

Professor Calleo made another suggestion with which I concur, and that is the notion that a system, an institution, is like a seashell after the occupant has left. It seems to persist and has an incredible strength even after it has outlived its usefulness. One illustration is NATO, in the sense that the institution is striving to make itself more relevant in the most absurd ways. Put yourself back ten or fifteen years. Can you conceive of NATO sitting around talking about air pollution? But this particular exercise, CCMS, is a classic example of trying to pump life into the wrong animal, one dead some time ago. I am not saying that these issues, environmental matters, should not be discussed, but they have relevance to Japan and Sweden and Switzerland and other nations of the world outside of NATO.

At the risk of being so crass as to refer to the title of the Panel—ending World War II—a few points can usefully be underscored; there are things that must be done soon to end World War II and to take proper account of the processes Professor Lawson mentioned. A minor example is our special nuclear relationship with the United Kingdom, which is a direct product of World War II and which is lingering and lingering, reaching crisis points every now and then—the famous Bermuda Agreement with President Kennedy, and now the crises over the Poseidon missile, the Trident, or what shape this special nuclear relationship will take. Is it perhaps not time for us to end that vestige of World War II, and to move in the direction of putting France and the United Kingdom in a more cooperative enlightening relationship? Perhaps the same might be said for the aftermath of the series of West German agreements with the Soviets and the Poles. Perhaps it is time for the Four Powers to take some formal note, some conclusory note, of the settlement of the Polish-German border, granting that the other issues still need to be left undefined because it is impossible to define them now. But surely it is now possible to define and to put the lid on that specific issue.

With regard to earlier remarks on U.S. force levels in Europe, and the institutions that might arrive in the wake of their departure, I wonder if they really should depart or whether it is necessary for them to do so. Would it be possible to take another look at some of the earlier

attempts at developing relationships between Europe and the United States? None of the panelists has really spoken about U.S. relationships with Europe or how the United States should react through all processes that are going on. It strikes me that it is time in this country for a congressional debate on Europe. Is it perhaps not time to consider a new U.S.-European treaty? Maybe we need a permanent commitment of U.S. forces to the Continent in much the same way as British forces were committed to the Continent under the WEU agreements. Too much I think has been focused on the physical presence of "x" number of forces in "x" locations. Under the assumption that there will be some significant reduction in forces, it might be well to consider some sort of an institutional commitment, maybe the old Western European defense idea, or even some sort of MLF concept revised in a proper way, so that there will be some sense of total commitment by the United States and Europe to each other. Such commitment with U.S. Senate approval (by treaty ratification) might provide a sense of stability as a counterforce to destabilizing elements of detente in Europe.

Finally I am a little surprised that none of our panelists has made more than a very passing reference to Yugoslavia, which strikes me as the most important crisis point in Europe in the coming period. At a time when our other panelists have commented that we have reached parity or gone beyond parity perhaps as perceived from Moscow, one shudders to think of what will happen in the post-Tito era.

The CHAIRMAN opened the discussion by commenting that he had the impression from Professor Jacobsen of a supreme confidence, or nerveless unshakability, on the part of the Soviet Union about the future, and that the adventures it was now embarking upon in Europe pose no significant risks for the Soviet Union, particularly for its hegemony over East Europe. By contrast, he was struck by Professor Calleo's indication that the future path of Western Europe in its relations with the United States was "paved with banana peels." The risks were predominantly on the Western side, and he found it disturbing to see the Eastern viewpoint given as one of supreme confidence and the Western viewpoint as one of considerable pessimism. Also, in the presentation of predictions for the future, the CHAIRMAN was struck by the absence of comment on how our relations with Europe, and Western Europe's relations with Eastern Europe, might look ten years from now. The road has been fairly well described, but what is at the end of the road, or down the road, is still imprecise.

Professor JACOBSEN commented that the comprehensiveness of the Soviet viewpoint was paralleled by similar, but no less explicit, comprehensiveness on the part of the West. The Soviets employed what used to be called "grand strategy." In the West, however, strategy was discussed in restricted military terms, at least until General Beaufre in the late 1960's introduced the term "indirect strategy." This was really the same thing as grand strategy in that one talks of explicit interrelations or interdependence between economic, military, and other concepts.

Professor JACOBSEN referred to a speech in which President Nixon foresaw five superpowers and saw the economic premise as an example of "grand strategy" thinking of the West. This line of thinking was beginning to resemble the Soviet viewpoint more and more. Previously there had been little comprehensive conceptual thinking in the West and such thinking had not been followed through to the extent that it has in the Soviet Union. It has not dominated Western literature to the extent that it has dominated Soviet literature. As an example, he cited a book on strategy written by Lagovski in 1957 which states the absolute necessity of having military people on civilian, domestic, economic planning organs and the necessity of having civilian economists and advisors on all military councils.

Regarding the question of Soviet weakness versus Soviet confidence, Professor JACOBSEN said that, rather than implying that the Soviets are all-knowing, all-capable and supremely confident, he wanted to stress that there is a qualitatively new confidence in Moscow today which did not exist before. He commended President Nixon's concept of five superpowers, as an example of "grand strategy" thinking on the part of the West, but in another sense the concept is totally false. Not only are there *not* five superpowers today, but the very concept depends on total emphasis on political and economic factors. Certainly these factors are important, but military factors must also be taken into account. And on these terms the world is not progressing from bipolar to multipolar, but has just recently progressed from unipolar to bipolar and will most probably remain bipolar for quite some time.

With regard to trade and the Soviet need for technology, Professor JACOBSEN emphasized that, while there is a wide gap, especially in the computer area, the overall technological need had been far greater in the past. Nevertheless, extensive trade relations had not been sought because they were considered too hazardous in times of strategic and general weakness. If the Soviets could manage without these ties in those days, why could they not do so today?

Professor JACOBSEN pointed out that the postulation of Soviet weakness is, to some extent, a product of American wishful thinking. The Soviets have achieved a degree of real parity and there is nothing the United States can do about it. Conversely, there is no way the USSR can establish real superiority. This situation will exist as long as there is the mutual guarantee of second-strike forces which are basically invulnerable and will probably remain invulnerable for a considerable length of time.

Professor JACOBSEN agreed with Mr. Downey that Yugoslavia is certainly the most important potential crisis point in Europe. At the moment the Soviet Union is clearly doing its utmost to "win friends and influence people" in preparation for this crisis. Professor JACOBSEN was very hesitant to believe the recent reports in Western newspapers of a drift to the right on the part of the Tito regime. The Soviets would certainly do their utmost to secure post-Tito Yugoslavia for the Soviet regime, but if a real anti-Soviet regime did develop, the dismemberment of Yugo-

slavia would follow. The Soviets would not tolerate an anti-Soviet regime in Yugoslavia. If the Soviets did intervene, Professor JACOBSEN was not at all sure that the United States would counter-intervene.

Commenting on Professor Jacobsen's statement that the Soviets did not solicit commercial exchange fifteen years ago when they were further behind in technology and trade, Mr. DOWNEY added that they were, indeed, much further behind in terms of basic infrastructure. However, at that point the Soviets felt confident they could achieve an adequate increase in basic infrastructure without the West. This "gap" in the high technology area, Mr. DOWNEY continued, is such a widening one that the Soviets have felt they could not bridge it on their own.

Clarifying his position on NATO, Professor CALLEO explained that he had not meant to suggest that the institution should be scrapped, nor did he take that position concerning other institutions that had outlived their usefulness. However, a reorganization of NATO was long overdue.

Professor CALLEO agreed with Professor Lawson that international organizations are significant. However, the problems of modern society are becoming increasingly domestic in nature. Social, industrial, or environmental problems, etc., are very real and need to be solved in many cases on a national or regional level. He observed that in the modern, essentially mercantilist world nation-states are the only institutions which have the political foundations needed to solve these problems. On the other hand, Professor CALLEO noted that many of these problems cannot be solved in isolation on a national scale, even in a nation as large as the United States. In a mercantilist world, all types of international intercourse require intergovernmental organizations. In this sense, intergovernmental organizations seem to have become essential in modern society.

As to the general question of the shape of the future world and the relations between the United States and Europe, Professor CALLEO commented that, if liberal and open relationships are to be maintained, some kind of international or intergovernmental organization will obviously be necessary. During the postwar period in which U.S. domination of the West was a natural state of affairs, the United States became accustomed to getting its own way and to using international organizations as instruments of American leadership, or in less polite terms, American hegemony. Professor CALLEO concluded that the problem remains whether or not the United States really can accept, learn to live with, or help create genuinely pluralistic and/or genuinely multi-lateral institutions. The American attitude toward the United Nations illustrates our lack of practice in and our tendency to turn away from these kinds of institutions.

The CHAIRMAN then opened the discussion to questions from the audience.

Asked to expand upon his comparison between the present situation in Europe and the interwar period, Professor CALLEO pointed out that an interesting parallel exists on the monetary front between French

monetary policy in the early sixties (their position being against the development of reserve currency systems, etc.) and their policy in the early twenties. One reason the monetary system of the twenties had difficulty maintaining normal operations was the role of war debts, reparations, etc., which were political factors. They continually raised problems in the operations of the market due to the enormous transfers involved. Similarly, much of the American balance of payments deficit is due to essentially political factors. There are also parallels between Japan with its large overproducing economy during the interwar period and the Japan of today. As to the problems existing between the United States and Europe, Professor CALLEO cited the strong pan-European movement of the twenties and thirties, which in many ways was based on the fear that a divided Europe might be dominated by outsiders. These parallels seem to illustrate the inability of the major industrial centers to come to terms with each other.

Mr. DOWNEY pointed out some obvious non-parallels of the two periods: (1) the great decline of emphasis on the nation-state; (2) the decline in importance of territory in terms of national strength; (3) and a general increase in the notion of basic human equality. Professor LAWSON added a fourth example: In recent intra-European relations the presence of an effective collective defense system has meant that national security has not been the fragile thing it was during the interwar period.

To a question concerning Western acceptance of East Germany as a separate state and prospects for German reunification, Professor CALLEO stated that, since the policy of nonrecognition has not been productive, reopening all channels between the two Germanies is, in the long run, the best way to submerge their differences and end their division. Professor JACOBSEN added that no one outside of Germany is interested in German reunification, and the Soviet Union, and most probably the United States, would not allow it.

Asked to comment on possible Soviet designs in Western Europe, Professor JACOBSEN replied that direct military aggression by the Soviet Union was unlikely, but because Soviet leadership consists of a complex nonhomogeneous group, it is difficult to be more definite in predicting the future.

A question was raised concerning the relationship between stability in Europe and peace in the rest of the world. Professor JACOBSEN did not think stability in Europe would necessarily mean stability elsewhere in the world. Mr. DOWNEY added that conversely instability and hostility in Europe does cause instability elsewhere. Professor CALLEO pointed out another aspect of the question. If Western Europe becomes more consolidated as a political bloc, there is the possibility of friction between Western Europe and the United States, and Western Europe and the Soviet Union. In his opinion, a more pluralistic situation among the advanced societies helps stabilize the Third World. Professor LAWSON asked whether in the event of amelioration of the Sino-Soviet situation,

the Soviet Union could be expected to take a firmer attitude toward Europe. Professor CALLEO wondered if this question of Soviet attitude toward Europe really mattered so much. In world strategy the greater emphasis is on Soviet-American rather than Soviet-European relations.

LEONORE BURTS
Reporter

THE LEGAL FRAMEWORK OF EAST-WEST TRADE

*(Jointly sponsored by the American Branch of the
International Law Association)*

The panel convened at 10:30 a.m. April 14, 1973, Rita Hauser* presiding.

REMARKS BY HAROLD J. BERMAN**

I shall focus attention, in the brief time allotted, on the role of the U.S. Government in promoting trade with the Communist countries, having in mind not the larger political and economic questions which underlie governmental action but the institutional questions arising from the fact that the entire foreign trade of Communist countries is conducted by state agencies, operating under a system of national economic planning, while the foreign trade of the United States, as that of other market economies, is conducted primarily by individual, privately owned business units operating more or less independently of government.

My main point is that a major aspect of the legal and institutional framework of trade between planned and market economies is active cooperation between government and business within the market economies—a cooperation that itself sometimes approaches the quality of national economic planning.

Prior to 1972, the role of the U.S. Government in trade relations with Communist countries was largely negative. A maze of restrictions was erected against such trade by legislative and administrative controls. Importers were restricted by discriminatory tariffs, prohibitions, and, in the case of China and Cuba, a total (or almost total) embargo. Exporters were restricted by severe licensing requirements, including technical data controls exercised upon foreign subsidiaries of U.S. companies, and by credit controls. In addition to these export and import

* Of the New York Bar.

** Harvard Law School.

controls, Soviet vessels were prohibited from entering U.S. ports, and there were various other such inhibitions upon commercial intercourse.

In the past year the U.S. Government has begun to dismantle this complex system of restrictions. It has assumed a role in setting new ground rules, especially through the US-USSR trade agreement, which are designed chiefly to protect American business against potential abuses at the hands of the monopolistic state trading agencies of Communist countries and to permit freer access to markets on both sides. That trade agreement (which can only take effect if the Congress implements its first section providing for the reciprocal grant of most-favored-nation treatment of imports and exports) contains provisions relating to market disruption, establishment of governmental commercial offices, establishment of commercial offices of business firms and trade organizations, and arbitration of disputes.

I would like, however, to emphasize the importance of Article 2 of the agreement, which in effect commits the two governments to take an active part in promoting U.S.-Soviet trade. This commitment is, I believe, the heart of the agreement. It reflects the acceptance of a wholly new concept, as far as the United States is concerned, of the role of our government in international trade. Article 2 states that the two governments envision that during the three-year life of the agreement total bilateral trade will triple, as compared with the period 1969-1971. It also states that the Soviet Government expects that its Foreign Trade Organizations will place substantial orders in the United States for machinery, plant and equipment, agricultural products, industrial products, and consumer goods. Further, Article 2 provides that both governments "will examine various fields in which the expansion of commercial and industrial cooperation is desirable . . . and, on the basis of such examination, will promote cooperation between interested organizations and enterprises of the two countries with a view toward the realization of projects for the development of natural resources and projects in the manufacturing industries."

Behind this language stands the Joint US-USSR Commercial Commission, formed in May 1972 to negotiate the agreement and thereafter to "monitor the spectrum of US-USSR commercial and economic relations." The Commission, which meets alternately in Washington and in Moscow, may appoint Joint Working Groups to consider specific matters, and in October 1972 it created a Joint Working Group to review and facilitate consideration of Soviet gas projects.

The American Section of the Joint Commission operates within a new branch of the Department of Commerce called "the Bureau of East-West Trade." The Bureau, which now operates under the supervision of Secretary of the Treasury Shultz, has four offices: the Office of Export Control, which maintains our declining security restrictions on strategic exports; the Office of East-West Trade Analysis, which studies the development of the economies of the Communist countries in order to project trade opportunities for American business; the Office of East-West Trade Development, which is concerned both with assisting

businessmen engaged in, or hoping to become engaged in, trade with Communist countries and also with promoting such trade; and, finally, the Office of the Joint Commission Secretariat, which provides the staff support for the U.S. Joint Commercial Commissions with the USSR and Poland.

The analytical and promotional activities of the Bureau with respect to American trade with the Communist countries, to quote the Director of the Bureau, "sometimes come very close to planning." Surely, the Bureau of East-West Trade is considering the kinds of products and technology which the United States should be seeking to export to and import from the Soviet Union, and surely those considerations are transmitted to the Joint US-USSR Commercial Commission and are discussed in the light of Soviet considerations of a similar nature.

The US-USSR trade agreement is not a "contingented" agreement of the kind that the Soviet Union and other Communist countries have negotiated both with each other and with a great many non-Communist countries, in which there are specific lists of contingents of products and plants to be exported and imported over a specific period of time. In the past, both Premier Khrushchev and Premier Kosygin offered us such a trade agreement, but we did not take up the offer. In fact, however, Soviet trade agreements with Western countries during the past six or seven years have become much less specific; they speak more in terms of percentages of increases in exchanges of various kinds, of cooperative ventures in various branches of industry, and the like. But behind these agreements stand various joint commissions and agencies, as well as business organizations, which carry on the concrete discussions and negotiations.

Similarly, the very general language of Article 2 of the US-USSR trade agreement, with respect to "substantial orders . . . for machinery, plant and equipment, agricultural products, industrial products, and consumer goods," and with respect to "projects for the development of natural resources and projects in the manufacturing industries," undoubtedly reflects elaborate and detailed discussion, within the Joint Commission of quantities and percentages of increase of trade and of cooperative ventures in specific areas. Presumably Soviet Foreign Trade Organizations and American business firms are consulted in these matters and consult each other.

It is worthwhile comparing the procedures that are now emerging in the United States to handle our trade with the Soviet Union, China, and other Communist countries with the institutional structures which have been developed for that purpose in other Western countries. I have in mind particularly the Franco-Soviet system of cooperation, which is perhaps the most highly developed. The two governments have established a *Grande Commission* headed by the French Minister of Economics and Finance and the Soviet Chairman of the State Committee on Science and Technology. The *Grande Commission* meets annually to set the directions which trade between the two countries should take. Under it are four subordinate commissions, and

under one of those subordinate commissions are 13 industrial sectoral working groups covering aircraft, chemical engineering, electrical industry, ferrous metallurgy, household appliances, clothing, food, and other items. Each of the sectoral groups contain about 20-30 members. On the French side there are directors of leading enterprises, heads of syndicates and of industrial associations, and government observers; on the Soviet side there are representatives of Foreign Trade Organizations and also, interestingly, of producer enterprises, as well as of the State Planning Commission, the State Committee on Science and Technology, and other such agencies. These sectoral groups as well as other joint committees can really be said, in a certain sense, to plan Franco-Soviet trade.

The French model should not be merely copied by the United States. We shall have to develop our own forms of cooperation. For one thing, French industry is much more highly cartellized than American industry. It is worth noting, however, that the Franco-Soviet institutional structure is set up so as to give an opportunity to the smaller French manufacturers to participate in trade with the Soviet Union, whereas in the United States, so far at least, our trade is largely confined to the very largest companies.

It is also worth noting that the U.S. Government has recently announced the formation of a council of business executives to consider expansion of trade with the People's Republic of China. A joint inter-governmental commission with China cannot now be formed because of the absence of diplomatic relations between the governments. Paradoxically, the Soviets are apt to be jealous of the US-China arrangement, because they are as eager to be linked with our businessmen as with out government representatives.

The important point is that government trade officials of the planned economies are not only political representatives; they are also business representatives. They are industrial magnates. They wish not only to establish ground rules for trade but also to carry on trade, to plan actual trade transactions.

For the United States, it is a risky matter for our government to engage actively in planning trade with other countries. But it is also a challenging matter, and challenging especially to American lawyers, who have always prided themselves on being architects of new legal and institutional processes to meet new situations.

REMARKS BY JAMES MITCHELL*

I have been asked to comment on the US-Soviet trade agreement and the negotiations leading up to it. Negotiations began in December 1971, when Secretary of Commerce Stans made the first ministerial level contacts with the Soviet Union on trade and commercial matters.

* Formerly Department of Commerce; presently General Counsel, Department of Housing and Urban Development.

Soviet Foreign Trade Minister Patolichev returned the visit in May 1972, meeting with Stans' successor, Peter Peterson. They got down to specifics on what each side wanted on trade matters. Then came the Summit Meeting and the adoption of "Basic Principles" of US-Soviet relations. In principle number seven, the two countries pledged that they would actively promote the growth of economic and commercial ties. They also agreed to establish a Joint Commercial Commission.

The Commission had its first meeting in Moscow in July at which drafts were exchanged. The Soviet delegation was headed by Patolichev; the U.S. delegation, headed by Peterson, included representatives of Commerce, State, and Treasury. At the second meeting in October in Washington, a series of agreements were reached.

In the negotiations, the Soviet Union sought: (1) most-favored-nation treatment for Soviet products (which they had in the 1930's but which was denied after the outbreak of the Korean war); (2) access to the credit facilities of the EXIMBANK; and (3) establishment of trade representation in the United States with diplomatic privileges. The United States sought: (1) settlement of the Lend-Lease account; (2) provisions concerning the presence of U.S. companies in the Soviet Union; (3) dispute-settlement procedures which would not involve the Foreign Trade Arbitration Commission (FTAC) in Moscow; and (4) access for U.S. exports to Soviet markets. The trade agreement accurately reflects the objectives of both sides.

As to most-favored-nation treatment, the initial provisions in Article 1 are straightforward, covering duties, quotas, exceptions for frontier traffic and trade with developing countries. The final exception concerning discrimination under multilateral trade agreements is designed to protect the rights and obligations of the United States under GATT.

As to Article 2, the United States wanted something concrete—a tripling of trade—and there is no question now that this will occur.

Article 3 concerning market disruption is a substantial qualification to most-favored-nation treatment. You cannot tell what it means from the language of the article or the Annex; you have to dig down into the exchange of letters between the two governments for the answer: if either side (and this is principally true in our case, where we do not control our imports, private businessmen do) indicates that imports from the other are disrupting its domestic markets, the other side upon notification and negotiation will not send those products. It is almost an import control upon demand. It reflects the concern, especially in Congress, that a monolith with state trading could flood our markets. (I think the more serious problem will be in finding things the Soviets can sell here to more nearly balance the trade.)

Article 4, which provides that currency payments can be made in dollars or other convertible currency, is a rather standard provision in Soviet foreign trade agreements.

Article 5 concerns the establishment of Soviet trade representations and a U.S. Commercial Office with diplomatic privileges. The problem

here was that we did not want the Soviets making deals wherein by reason of diplomatic privileges they would be immune from suit. So there is an express provision that the trade representations will not be immune from suit.

Article 6 covers the Soviet trade representations in the United States and the U.S. companies in Moscow. Again the text does not deal with the heart of the matter, at least from the U.S. position; that is to be found in an exchange of letters which seeks to establish most-favored-nation treatment for our businessmen, who will be permitted to establish their offices on terms no less favorable than those accorded any other country.

Article 7 on arbitration is fairly straightforward. It relies on the rules of the ECE upon which both the United States and the Soviet Union could agree. More significantly, for the first time, the Soviet Union has agreed to third-country arbitration.

Article 8 makes all of the provisions of the agreement subject to the security interests of each country. Article 9 provides that the trade between the two countries will continue to be supervised and implemented by the Joint US-USSR Commercial Commission.

The agreement will enter into force upon the exchange of written acceptances. This requires, on our part, enactment of a change in our tax legislation which will grant the Soviets nondiscriminatory tariff treatment. This bill has now gone to Congress as part of a general trade bill, and we are hopeful that it will be enacted at the earliest possible moment.

As Mr. Berman said, the agreement is no more than a set of ground rules, and I agree with him that the most important aspect of this entire negotiation will be the day-to-day contacts between the Soviet trade offices and our businessmen. I never cease to be amazed at the enterprise of American businessmen; we were probably low when we said trade would triple. I think it will be higher than that.

REMARKS BY RAUER MEYER*

I shall address myself to controls on exports. And here, when the program talks about the "Legal Framework of East-West Trade," it might more properly be called a "thicket" rather than a "framework." At least ten pieces of legislation govern exports, but I shall focus on controls exercised by the Department of Commerce, since they affect the vast proportion of commodities in commercial transactions with the Communist countries. I shall not distinguish between the situation with regard to the People's Republic of China and the Eastern European countries, because our published regulations make no such distinction.

Our controls are based on the Export Administration Act of 1969, as amended by the Equal Export Opportunity Act of August 1972. The notable fact is that our legislation is markedly different from the Export

* Office of Export Controls, Department of Commerce.

Control Act that prevailed for over 20 years. The three basic objectives of the legislation are: (1) to promote national security; (2) to further foreign policy; and (3) to protect the domestic economy from excessive drain of scarce materials. The act also provides: (1) that trade shall be encouraged; (2) trade controls shall be reviewed and reduced to the minimum levels essential to achieve the policy objectives of the act; and (3) procedures that are, may be, or are claimed to be more burdensome than procedures for export control exercised by any other free world country shall be reviewed. Lastly, the act puts pressures on the administrators to accomplish a review of the control list as well as a review of "burdensome procedures" by calling for a report to Congress by May 29 of this year. We are also obligated to consult business for advice and information regarding the level of our controls. Generally speaking, they can be expected to try to persuade us that the controls are excessive.

The political and economic context in which controls are administered is radically different from what it was two, three, or ten years ago. Vietnam has been defused and commercial detente with the Soviet Union and other countries of Eastern Europe is being pursued. Admittedly, controls have an impact on trade but I think their deterrent effects ought not to be exaggerated. There is ample room for trade to expand outside the areas where fairly tight controls persist. To the practitioners, I offer this advice. Businessmen should not on their own make negative judgments regarding prospects for the issuance of licenses. They should consult the Offices of Export Control; we do give advisory opinions as to whether the prospects are likely or remote.

As to current directions, the essential U.S. commercial objective is to normalize trade between the centrally planned state-trading economies of the Communist countries and the market economy of the United States. Export control is an abnormality to the People's Republic of China and the countries of Eastern Europe. To the U.S. Government, controls are still a part of our national security system; but this need for security controls must be weighed against the foreign policy objectives of detente, the commercial objective of normalizing trade, and the economic problems associated with a balance of payments deficit. Each of our control actions must be, and is being, taken with these considerations in mind and particularly with the best understanding we can develop of the economic consequences of our actions.

With respect to the future course of controls, I find it impossible to make any predictions regarding the statute and possible changes in it. I like to think that if we do a decent job of reviewing the control list and the burdensome procedures (that is, if we do what Congress has obligated us to do) they may decide there is no need to revise the act further. I should note in this regard that there are a number of bills in the congressional hopper calling for revision of the act to make explicit controls on exports of scarce commodities. The focus at the present time is on exports of timber, cattle hides, copper scrap, and there have even been murmurs about excessive food exports.

As for future administrative changes, these are easier to deal with. Mr. Berman used the word "dismantle"; I prefer to describe what we have been doing as "rationalization" or "modernization." We are presently engaged in what amounts to a practical elimination of controls exercised unilaterally by the United States. I fully expect that when we report to Congress, we shall have eliminated controls on 475-500 of the 550 commodities on the control list. We shall have reduced the list to essentially hard-core items so significantly related to military hardware, design, and use that we feel controls must be continued, notwithstanding the availability of some of these commodities from other free world countries.

With respect to licensing, I think we shall continue to license when the security requirements of the act, as we interpret them, are satisfied. We have made very significant progress in licensing products that two or five years ago we would in all probability not have licensed. We are, for example, licensing export of computers, subject to certain conditions and under certain circumstances.

I also anticipate revision of some of our procedures which will simplify controls and make them more manageable not only from our standpoint but from that of the export community. We are in the process of introducing management techniques, including a degree of automation, which will speed up licensing decisions. We acknowledge that in today's competitive world a license delayed is often a license denied. Lastly, we are going to improve our interface with our industry-exporter clientele. We are going to be in a better position to transmit information to them on controls and control changes and are going to have a better mechanism for soliciting their advice.

REMARKS BY GRAHAM METSON*

Most people view our current relations with China as a sudden development but actually they were carefully planned and were one of the first orders of business when the Nixon Administration took office. The Administration considered various ways of establishing some mode for direct political contacts which would be more satisfactory than the Warsaw Talks. Those talks had been very productive; they were high-level negotiations. Although we had no diplomatic relations in a legal sense, we had more talks with the Chinese leadership over this ten-year period than did any other country. However, the talks had become stagnant and so we sought new modalities. Many small steps were taken in an effort to convince the Chinese that we were interested in establishing contacts with them, for example, allowing U.S. tourists to bring in more Chinese goods. At the time, only small steps were possible for during the crisis of the Cultural Revolution, with its attacks on foreign embassies, the Chinese were neither willing nor able to expand their foreign contacts. We have now reached the

* Department of State.

stage of establishing Liaison Offices in Washington and Peking, a step which would have been impossible four years ago.

What does this mean for American business? We are in the process of trying to establish new means of getting American businessmen in touch with Chinese planners and traders. The National Council for U.S.-China Trade, within the Department of Commerce, is intended to provide a means of contacting the Chinese in their own fashion. The Chinese have an organization, the CCPIT (Chinese Council for the Promotion of International Trade) which deals with business in countries not recognized by that government. It is very effective and acts as a sort of Chamber of Commerce. Our organization is not fully formed but will parallel the CCPIT in representing American business to them and in answering Chinese requests for access to American industry. For example, it will probably circulate a publication in China and one in the United States to acquaint American business with the possibilities of trade with China.

My main worry is that much too much emphasis is being placed on big business; the petty trader who, in my opinion, will be an important factor in US-China relations is not taken into account. There are other problems such as the American attitude toward antitrust. We are in a sense experimenting in developing both trade and contacts. Trade is a positive, concrete example of mutual willingness to deal with one another rather than shooting at one another. As such it is a normalizing process.

In practical terms, trade is going very well and is expanding beyond what I would have anticipated a few years ago. The first year after we dropped the embargo, trade amounted to \$4.9 million, mostly in U.S. imports through third countries. Last year it reached \$92.3 million, mostly in U.S. exports, including \$57 million of agricultural products. Contracts amounting to \$300 million have already been reported for delivery this year. Should this trend continue, we could be China's number three trading partner next year, and possibly sooner if the Chinese place large orders for agricultural products. I would never have imagined this situation but it demonstrates that once the Chinese take the political decision on the direction of trade, it can increase in significant fashion.

As to the East-West Trade Policy Committee, it is a high-level and abstract group which is not yet seized with Chinese matters, although it probably will become more active in this area in the future. It can deal with Soviet importing organizations but the Chinese do not conduct their trade in such an open fashion. (By Chinese standards they have been remarkably open with us in the last several months.) The overall State Plan is not published. It apparently calls for major increases in transportation facilities and oil production. One can make educated guesses on the basis of the kinds of materials the Chinese are importing and the kinds of questions they are asking. Once our Council is fully in operation, I would hope that it would include an economist to provide analyses of this nature, but that is a long way down the road.

In conclusion, may I note that trade with China is very different in character from Soviet trade. Nor does experience in trading with Eastern Europe offer much in determining the proper approach to trade with China. For the near future, we shall have to keep these different areas completely separate.

REMARKS BY WALTER GLASS*

I shall discuss some of the practical legal problems we have encountered in our efforts to trade with the Soviet Union and the Eastern European countries. I should like to say at the outset that ever since I began to work in this field in 1964, the U.S. Government has been very helpful. Within the framework of congressional export policy, the Department of Commerce has always endeavored to make allowance for the needs of the American businessman. The State Department has also been helpful; I recall in particular a really first-rate briefing by our embassy in Bucharest when East-West trade was a very new subject.

The new trade agreement, as far as it goes, is an added accomplishment. Those of us who have tried to negotiate particular commercial transactions with the Communist countries can understand the effort and skill involved in negotiating the treaty. However, statements that within this framework the small trader should now be able to participate easily in East-West trade may be unrealistic. We are a substantial and experienced international trader, but even our facilities have at times been strained. Negotiations are slow; the issues are very complex; and a very substantial investment in negotiations has to be made before anything concrete materializes.

Furthermore, some of the most difficult issues are not touched on by the trade agreement. For example, a major problem in one of our current negotiations is the question of the performance guarantee. Those of you with experience in East-West trade will know that, when you try to sell technology, the Soviets will normally insist upon a guarantee that the technology will work in their plants. To accomplish this they have a simple standard procedure: they will construct the plant in accordance with the standards you recommend; if the plant does not produce as many units of the quality they had bargained for, they will consult with you and if it still does not work they will try it again; and if it still does not work they want their money back, plus 6%. This is hardly an attractive prospect for an American company.

On our side, we also have a developed procedure for technology sales. Normally, we explain that we have a functioning plant; that we will give the buyer all the documents that we use; and we will guarantee that they are the same documents that we use. But that is the only guarantee we give. We have done this for many years in many countries with success.

* General Electric Company

It is easy to see why we have one approach and the Soviets have another. Their primary concern is the fulfillment of the five-year plan. They want to know that at a certain point in time there will be a plant in operation, producing a certain quantity of goods of a specified quality. From the American side, the managers must assess whether on balance their chances are greater for making money than losing it; there must be some limit on the risk involved. We have tried to explore with the Soviets what their objectives are and to explain our motivations to them in turn. On that basis we have tried to work out compromises that will meet the objectives of both sides. It is possible, for instance, to work out a performance guarantee with appropriate conditions and with some kind of limitation on liability, but it is a very complex project.

How does this relate to U.S. Government programs? With regard to export controls, I would like to say that, while they at times have been troublesome and time consuming, they are fundamental insofar as we are concerned in doing business with Communist countries. We would not want as a company to have to make the decision as to what can be sold to the Soviet Union without affecting the strategic interests of this country. That is a decision for the government to make and we are glad they are prepared to do so. However, one of the hazards one has to face in East-West trade is that our own government may change its mind and may revoke an export license already granted. We had some agreements with the Soviet Union back in 1947-48 but then came the Korean War; the Export Control Act was enacted barring our exports, and we lost a good deal of money. As a result, we are quite interested in some form of government insurance in cases where export licenses are revoked. I was pleased to see that the EXIMBANK is prepared to issue such insurance, at least in connection with exports it finances.

Various other matters would be helpful to us. First, expansion of opportunities for financing exports. This is purely a competitive question. All the European countries have extensive financing facilities which they use freely in East-West trade. Second, any steps taken by the government to enable the Soviets to pay for American products would be helpful, including facilitating the purchase of Soviet products. Thirdly, the development and dissemination of more information about the Soviet Union would be helpful. The Soviet Union is not easy to understand. We hear a great deal about monolithic trading organizations. That may be as much of an oversimplification as the Soviet view that American capitalist enterprises and the U.S. Government are always of the same mind. That the Soviets feel this way becomes clear when one attempts to negotiate a *force majeure* clause dealing with revocation of export licenses. The monolithic view may be caused in part by our lack of information. This is not because of any lack of attention; it is just sometimes very difficult to understand Soviet organization and procedures. Finally, the effort to establish additional facilities that American business can use in Moscow is important.

Further improvement in communications facilities, be it mail or telephone, would be a great service. Sometimes it seems that facilities in Moscow are increasingly overburdened because there are so many people who have just developed an interest in trading with the Soviet Union.

A: to the broader and newer issue of government-business participation in trade, I cannot say that I have arrived at a rational position regarding this very complex issue. It is clear that in international economic affairs governments are playing a very active role. Certainly that is true for Japan, for the United Kingdom, and, as Mr. Berman has pointed out, for France. I do not know to what extent these techniques can be applied to American business.

The discussion was then opened to questions from the floor and the panelists were asked to comment on the preceding presentations.

Following a comment from the floor on the arbitration provisions in the US-Soviet Treaty, Mr. BERMAN noted that Mr. Mitchell had spoken of the first part of the provision for third-country arbitration but had ignored the second part of the clause under which the parties may decide upon any form of arbitration they mutually prefer. Did the United States win as complete a victory on this point as was suggested?

Mr. MITCHELL replied that the USSR had never before formally agreed to third-country arbitration in any intergovernmental agreement. From time to time the Foreign Trade Organizations have agreed with foreign companies to arbitrate in Sweden, for example, but they have never formalized this. The Soviets consider their Foreign Trade Organizations independent entities and it is a matter of negotiation between that entity and the foreign company. We took the position, and it was acknowledged by the Soviets, that there was a directive by the Ministry of Foreign Trade that all Soviet Foreign Trade Organizations, as their first priority in negotiating this clause in a contract, must insist on arbitration in Moscow under the FTAC. We have succeeded in eliminating this directive and the General Counsel of the Foreign Trade Ministry has circulated the text of the new agreement on arbitration to the FTO's with the statement that they no longer are to insist upon the directive. We wanted American businessmen to be in the position where, if they wanted third-party arbitration, they could point to a document where the Soviet government had gone on record that this is Soviet policy. We also recognized, as did the Soviets, that the parties may indeed want arbitration in some other manner.

Q. Concerning the offices of American businesses in Moscow, what is the impact of Soviet domestic law on these presences? Would Soviet labor law, for example, apply to Soviet citizens hired by such offices? What about taxes?

Mr. MITCHELL explained that the Soviet Government has said it would make every effort to ensure that there would be no adverse effects upon companies establishing offices in Moscow. They will deal with Soviet employees of such offices in the same way as they deal with Soviet citizens employed by foreign embassies. Mr. BERMAN responded that no Soviet law seems to be applicable to this situation.

Every company is expected to negotiate these details with the Soviet Government and this would seem to apply to such matters as wages. It was his understanding that the U.S. Embassy pays Soviet employees on the basis of American rather than Soviet wage standards. No taxes are applicable to foreign companies in the USSR, but this does not mean they will never be taxed—again, it is a matter to be negotiated.

Q. Concerning the role of a major American exporter to the USSR and its responsibility to smaller American firms, the point was made that once the USSR became accustomed to dealing with such a firm it might wish to expand that relationship and the firm would find itself in the position of a supercontractor supervising a wide range of commercial activities. Would this be commercially viable for a large U.S. company? Would antitrust problems arise? And is this something the U.S. Government would want to encourage?

Mr. GLASS replied that large U.S. companies have been asked to facilitate exports by smaller companies and this has been done with limited success. Basically, those companies that want to export are doing so; those not exporting choose not to do so. Our efforts involve small enterprises to a significant extent, especially in selling machinery to the Soviets which we do not make. When we go to our suppliers, they often respond that the business is not significant enough to them to justify the risks involved or the added personnel they would need. This is a difficult problem.

Q. Have the United States and the People's Republic of China agreed on payment to the United States for materials supplied to the Nationalist Government during the civil war?

Mr. METSON noted that certain claims have been filed with the Foreign Claims Settlement Commission and have been adjudicated; they are now in the office of the Secretary of State. Claims are a problem in regard to trade with China. The Chinese are buying through third countries and companies rather than taking title in the United States where the goods might be attached pursuant to private claims. We have agreed in principle with the Chinese to settle these claims, which is important since the Chinese do act once they agree in principle. Details are now being negotiated in Paris. Government claims for goods provided the Republic of China under aid programs are not being negotiated; there are successor-state problems involved here.

Q. Do contracts with the Soviet firms have clauses regarding the choice of law?

Mr. GLASS observed the USSR has been persuaded at times to accept arbitration in a neutral country. His company tried Paris and Switzerland, without success, and settled on Stockholm. The forum provides the procedural law. For the substantive law, we look first to the text of the contract and then to the contract law of Sweden.

Mrs. HAUSER noted that the Senate debate on the Jackson amendment was oriented to Congress' finding an effective handle by which to influence the Soviet Union on the question of human rights. Congress may get the chance to review periodically the most-favored-nation

treatment on the basis of what is going on in the Soviet Union. How would this really affect detente when and if things change in the USSR or China?

Mr. BERMAN replied that the Soviet Union has taken the view that trade should be neutral and separate from political pressures. We do not yet know what the Chinese attitude is, but they may also take the position that trade and politics should be kept apart. It would be very dangerous for the United States to make the most-favored-nation policy dependent upon the political climate. Trade is an area where mutual advantage can best be attained if politics are put aside. Mr. METSON added that the passage of the Jackson amendment would be a disaster. It would complicate relations with China tremendously.

PATRICIA O. LAWRY
Reporter

ECONOMIC DEVELOPMENT AND HUMAN RIGHTS: BRAZIL, CHILE, AND CUBA

The panel was convened at 2:30 p.m., Saturday April 14, 1973, Ambassador Clarence Clyde Ferguson, Jr. presiding. The CHAIRMAN observed that the topic of the panel's concern dealt with the extent to which economic growth necessitated the curtailing of human rights and political freedoms. If there is in fact a conflict between these two dimensions, the tension is perhaps most acutely felt in the United Nations through which much of the economic development over the past decade has been accomplished, and which has always stood for the preservation and the expansion of human rights and fundamental freedoms. Indeed, the UN Commission on Human Rights has been concerned with this particular problem of the effect of economic growth on human rights. In Africa, with which the CHAIRMAN remarked he was most familiar, several examples tend to indicate that there may be a need to sacrifice human rights in order to attain rapid economic growth. The CHAIRMAN queried the panelists whether this was in fact the case, especially in Latin America on which the speakers would focus.

WHEN IS AN OMELET? WHAT IS AN EGG? SOME THOUGHT ON ECONOMIC DEVELOPMENT AND HUMAN RIGHTS IN LATIN AMERICA

*By David M. Trubek**

It has been observed that the international development effort is a form of secular religion. If this is so, we can say that the salvation it aspires to is the realization of human rights. Thus it is no surprise

* Yale University.

that the doctrine and dogma of development work, appearing in the secular guise of "theory" and "policy," are intimately concerned with the problem of the relationship between economic development and the ultimate goal of human rights.

This panel is an invitation to reexamine some of this doctrine, in the light of recent experience in Latin America. This is an age of reappraisal in which we are as much concerned with analyzing the way we think about social problems as with social problems themselves. Development studies are not immune from these trends, which are apparent in many of our social disciplines. We have become critical of many aspects of our development theory and policy. One area of especially acute concern is the topic of this panel—the nature of the relationship between economic development and those human rights which are the ultimate goal of our quest.

The basic issue is simple and classic. Are there "tradeoffs" between expansion of human rights on the one hand, and rapid economic growth, on the other? Or, to employ the famous culinary metaphor, can you make an omelet without breaking eggs? Clearly, a case can be made that the recent history of Brazil, Cuba, and Chile—the three Latin American countries under review—would tend to confirm the traditional recipe that omelet construction requires egg sacrifice.

By "human rights" I mean the guarantees and aspirations included in international and regional declarations and covenants to which some or all of the American Republics are parties. Thus, they include both classical political and civil rights such as rights to fair trial and free elections and freedom of assembly, as well as economic, social, and cultural rights, such as the rights to work, to adequate standards of living, including food, clothing, and housing, to education, and social security. Implicit in the idea of economic and social rights is a commitment in most, if not all societies to some degree of redistribution of income as a necessary corollary of the basic guarantee of these rights. On this definition, we see that the nation in Latin America that is experiencing the fastest economic growth seems to be doing relatively little to preserve "human rights." Thus, for the past six years the Brazilian economy has grown prodigiously. Yet at the same time a citizen's ability to participate in political life has been curtailed, protection of individual rights and liberties has been weakened, and income has become progressively more concentrated in the hands of a small part of the society. On the other hand, both Chile, which continues to maintain an open political system, protects individual liberties, and attempts income redistribution, and Cuba, which has reduced social inequities have much less impressive economic growth records. Can it be, then, that rapid economic growth in Latin America *requires* political repression and intensified social inequality?

Certainly there are no grounds for concluding from this data that this is the case. We have no reason to conclude that Brazil's adoption of an authoritarian political system and a regressive income distribution policy have *caused* its rapid growth rate, just as we cannot conclude

that Chile's recent economic difficulties stem from its continued adherence to a democratic political order. However, certain conclusions *can* be drawn from this data. While recent developments will not permit us to conclude that development can only be bought at the price of sacrifices of human rights, we must admit that such sacrifices do not seem to *jeopardize* rapid growth. Moreover, we are also forced to conclude that rapid growth does not necessarily foster human rights. These are not trivial conclusions and they force a reappraisal of earlier ideas.

To demonstrate this, we must first examine the concept of human rights more closely. At the core of all ideas about human rights are two basic notions: that all men are equal and that all communal action ultimately must be justified by its effects on the lives of individual men. But, while ideas of equality and individualism are central to the concept of human rights, in the development and institutionalization of these ideas different types of rights emerge.

Thus, it is traditional to distinguish political and civil rights from economic, social, and cultural rights. The former define the relationship between the individual and the state. The right to a fair trial, to equal protection, to political participation, and to expression, restrict the *mode* of state action or guarantee that state action will be determined by certain processes. But it should be noted that these rights impose no specific restrictions or positive obligations on the nature of the policies the state may carry out, nor do they *specify* any particular end for which citizens will exercise their freedom. Thus, a right to a fair trial or hearing tells us what kind of procedures the state must follow before it acts or exercises coercion, but not what programs may be enacted or what crimes may be created. Similarly, formal equal protection demands that the state treat men equally, but not that the state make men equal in a substantive way.¹ Political and civil rights express the ideals of the liberal *state*, but do not reflect any notion of the ideal *society*, the definition of which is left to the actions and choices of the individual citizens.

The concept of economic, social, and cultural rights, however, is very different. These "rights" reflect aspirations for a specific social situation and prescribe a concrete set of social relations. When we speak of "rights" to housing, employment, free education, social security, etc. we have in mind imposing on the state certain specific choices and policies which are held to be required *regardless* of the process that is followed to formulate or execute policy.² Thus, for example, if we

¹ These ideas can be seen in our own legal doctrine. For example, we say that a state has no obligation to allow criminal appeals, but if it does, it must provide transcripts, counsel, etc. to indigent defendants.

² Some rights are on the borderline between the political and the social. The right to education is usually considered a social right, as it guarantees a certain minimum of social goods, or imposes a specific social program on the state. On the other hand, it could be argued that education, like freedom of speech, is necessary for the functioning of the political process in a democratic state, and thus is actually a necessary formal guarantee of a political process whose output is otherwise unspecified.

argue that men have a right to "substantive" equal protection, we are asserting that the state is under an obligation affirmatively to reduce social inequalities.

Clearly, there is a difference between a "right" to housing and to a fair trial. If a right to "adequate housing" means anything in Latin America, it must mean that many citizens are being promised better housing than they currently have. Thus, when we speak of the "existence" of substantive rights such as housing, health, or education, we will often be asserting a requirement for increasing the total social product as well as an obligation to distribute it in certain ways. Because the recognition of such "rights" may necessarily entail economic development and/or redistribution of income, some international documents, including the American Convention on Human Rights, couch the commitment to economic, social, and cultural rights in terms of a commitment to "progressive realization" instead of the language of legal entitlement of municipal bills of rights and international conventions on political and civil rights. Nevertheless, the language of "rights" is employed in the economic and social area, perhaps to imply that these aspirations are contingent only on the availability of material resources and, given a certain degree of affluence, are as obligatory as any political and civil right.

Official declarations of human rights in Latin America have included both types of rights: both national constitutions and inter-American declarations espouse a broad gamut of individual liberties and substantive "entitlements." Some documents note a difference between the nature of the "guarantee," but none breathe any hint of possible *conflicts* between political and civil rights such as voting or a fair trial, on the one hand, and rights to health, employment, social security, and education on the other. Since it must have been apparent to the authors of these documents that both economic growth and redistribution of income were necessary conditions for realization in Latin America of many of the economic, social, and cultural rights they asserted, we can assume they believed that efforts to foster economic development and effect income redistribution—thus guaranteeing such rights—would simultaneously support efforts to expand and extend political and civil rights. Conversely, we can assume they believed that efforts to strengthen the liberal state would maximize possibilities for economic development. No conflict was perceived between the *liberal* and the *developmental, welfare* state—the latter the instrument for realizing economic, social, and cultural rights.

Such ideas about the relationship between human rights and development were *implicit* in documents like the 1948 Declaration of the Rights and Duties of Men, signed by the United States and all the Latin American Republics, and other international texts. They became *explicit*, however, in inter-American discussions in the 1960's and formed part of the development doctrine which served as the rationale for U.S.-Latin American policy in that period.

This can be seen in theories about democracy and economic development which the United States offered as explanations for its commitment to aid Latin American economic development through the Alliance for Progress. The U.S. involvement in Latin societies was justified ultimately as fostering human rights. Economic development was seen merely as an instrument to strengthen political and civil rights and expand protections of economic, social, and cultural rights. The Alliance program of economic assistance and social reform was warranted because of the intimate relationship between development and human rights.³

Basically, the theory ran as follows:

(a) rapid and substantial economic development in Latin America was a necessary condition for the strengthening of both political and civil, and economic, social, and cultural rights;

(b) a "free," or basically capitalist economic system was the most efficient instrument to increase economic growth;

(c) a capitalist economic system operating in the context of political and civil rights, *i.e.*, within a liberal state, would lead to the widest and greatest realization of economic, social, and cultural rights; and therefore

(d) the liberal state was most likely to foster a capitalist form of economic development and capitalism was the economic system which would maximize realization of all human rights.

Accordingly, measures to foster economic growth, provided this occurred within a "free" economy, would in the long run guarantee human rights, and thus realize the ultimate goals of our policy.

The program was, of course, not limited to *economic* measures. The Alliance included a program of direct social reform through improvements in areas like health, education, and literacy, as well as institutional reform through administrative modernization designed to strengthen the developmental and welfare capacity of the Latin governments. Indeed, the social and institutional measures were seen as a new dimension in U.S. aid policy.

While the Alliance did place more stress on social reform than earlier U.S. efforts, it represented only a very limited modification of earlier perspectives. The laissez-faire policies the United States followed towards Latin American development in the 1950's were based on the assumption that Latin American nations had, or would evolve, basically capitalist economies and would, therefore, naturally develop a liberal state guaranteeing political and civil rights and simultaneously fulfill the program of economic, social, and cultural rights. The Alliance for Progress, in this perspective, resulted from a recognition that Latin American economies were not, nor would they necessarily become, capitalist systems. Latin American societies lacked many of the basic features

³ See, e.g., D. Rusk, *The Alliance for Progress in the Context of World Affairs*, in DREIER ed., *THE ALLIANCE FOR PROGRESS* (1962).

deemed necessary to the operation of an industrial capitalist system.⁴ Thus they needed a push and assistance to become truly efficient capitalist societies. And this push had to include social as well as economic reform. However, it was assumed that, once the social bases of an industrial, capitalist ("modern") society were laid and the basic elements of the industrial economy created, "natural" forces would lead to sustained economic growth and to guarantees for all human rights.

Events of the past decade cast doubt on some aspects of these theories and thus on any policy that may, in fact, be derived from them. Brazil has adopted a state-directed but substantially capitalist mode of growth. It has experienced rapid increases in output but at the same time has abandoned the liberal state and done relatively little to further the economic, social, and cultural rights of the vast majority of the population. At the same time Chile has maintained political and civil rights while moving toward a socialist economy. So we have reason to doubt the existence of necessary relations between the type of economy and the political system and to question the assertion that capitalist economies will necessarily foster formal and substantive rights more effectively than other economic systems. We have learned that we have no clear ideas about the relationship between economic development and human rights.

As we lose faith in the viability of the simplistic liberal-capitalist growth model, we are naturally tempted to adopt its opposite and accept the necessity of authoritarian models of development. One can see this tendency in such policy statements as the Rockefeller Report, and the current U.S. policy which embraces authoritarian Brazil and is hostile to Chile and Cuba. Since we cannot abandon our basic ideological commitment to fostering human rights, this policy must ultimately be justified in terms of a new theory of the relationship between human rights and development.

Thus, the argument runs, it was always clear that the liberal and welfare states, and the full protection of human rights, were impossible in Latin America without rapid economic growth. Further, it is asserted, we now have reason to believe that rapid growth cannot occur unless political activity is suppressed and pressures for rapid redistribution of income are resisted. Thus, the argument runs, we must make a hard but clear choice: if ultimately we want to see human rights fully protected in the long run, we must tolerate shortrun sacrifices of political liberty and tolerate regressive income policies. It is better to break eggs than to go without omelets. Thus if a regime can produce impressive growth rates, we should not be concerned with the political measures it feels constrained to adopt.

⁴ The Alliance emerged at a time when the social sciences in America were rediscovering what European sociology had recognized in the 19th century: that a capitalist economic system could only function in the context of a certain kind of society, which we now label "modern." The Alliance program for social reform was basically a recipe for forced modernization for, that is, the creation of the social bases of industrial capitalism.

But what kind of an omelet is being concocted here? Of course, we can always support authoritarian regimes for reasons unrelated to human rights. But that is not the argument. The new wisdom does not counsel a saddened retreat from these basic goals. Rather, it is argued that history is sufficiently perverse so that the only, or at least the best, way to secure these rights tomorrow is to deny them today.

Thus the arguments must rest on the belief that shortrun sacrifices will foster growth and will ultimately be reversed as increased levels of economic welfare make possible the rebirth of freedom. The argument rests on those very stale theories about the necessary relationship between capitalist development and human rights that we all had rejected. If, however, there is no rational reason why rapid economic growth should necessarily lead to increased democracy, what guarantees have we that the broken eggs will produce a very palatable dish? The defenders of support for authoritarian regimes rely on an implicit or explicit notion of the automatic "withering away" of authoritarianism: yet there seems no more evidence to justify such a belief than there is for the Marxist concept of the withering away of the state.

The argument that authoritarian capitalist development is consistent with human rights may, however, rest on an additional and independent ground which requires analysis. It is obvious that the critique of authoritarian capitalist development mirrors the liberal critique of Communist development policy. But there are reasons why these criticisms may seem less cogent when they are addressed to a capitalist and thus market economic system than when they are aimed at a command economy. For this reason, some may feel that an authoritarian capitalist system by definition represents less of an inroad on human rights than an authoritarian regime in a command economy.

The basis of this argument is that capitalist development relies on markets to allocate resources. Whatever political deprivations may be associated with authoritarian capitalist growth models, at least this system will give individual consumers what they want and channel the fruits of growth to the people. This is the basis for the claim that "free" economies are more likely to lead to fulfillment of "economic rights" than command economies.

The best that can be said for this argument is that it rests on a number of empirical assumptions that must be carefully examined. While it may be true that some hypothetical market economy may have these characteristics, we can question whether these conditions hold for the type of growth model adopted, for example, by Brazil. The result may be the allocation to a limited class of the population of those consumer goods that the large private corporations produce most efficiently and for which a demand has been created through advertising, rather than an effort to improve the lot of the *entire* population at least up to minimal standards that the commitment to economic and social "rights" suggests. The concept of economic rights and the belief in the market stem from the same basic commitment to the individual as sole arbiter of social action. But a market which excludes the vast mass of the population

and brings much to the few and little to the many, is the very opposite of the ideal reflected in the commitment to human rights.

The conclusions one can draw are very limited. We admitted that the formal-legal approach to economic development is an inadequate means to secure the goals contained in the program of human rights. So we recognize the need to move to deeper levels of analysis in an attempt to determine what changes in society, polity, and economy are likely to encourage the realization of these rights. Although our development doctrine has attempted to address these issues, recent events cast doubt on the cogency of our analysis and make us realize that we know very little of a general nature about these relationships. Perhaps at this stage all that is possible is a close and detailed investigation of concrete cases, an investigation that is sensitive to the relationships we wish to trace and unclouded by *a priori* theories or dogmas. While there is not sufficient evidence to prove or disprove the "tradeoff" theory, at least it should be said that the burden should be put on those who propose to sacrifice human rights in the name of economic development. Perhaps from such an appraisal we will emerge on firmer ground than we are today.

THE PERFORMANCE OF THE CUBAN REVOLUTION: A PROVISIONAL ASSESSMENT

*By Jorge I. Domínguez**

Is the Cuban Revolution "good?" This essay seeks to assess the performance of the Cuban revolutionary government as it prepares for its fifteenth birthday in January, 1974.

We will evaluate the revolutionary government's performance on eight basic values of social life identified by Harold Lasswell and Abraham Kaplan, as modified partly by Karl Deutsch, and further modified for the purposes of this essay. *Power* is the participation in decisions about severe sanctions or the capacity to change the probability of outcomes. *Enlightenment* involves knowledge, insight, and access to information. *Skill* is the proficiency in the practice of any arts and crafts, in trades, or professions. *Wealth* is income, including both goods and services. *Well-being* includes both health and safety. *Deference* includes status, honor, recognition, prestige, glory, or reputation. *Rectitude* comprises moral values: virtue, goodness, righteousness, etc. *Affection* includes both love and friendship.

In addition, we will ask questions about four modes of enjoyment of these basic values. *Security* is the expectation that the enjoyment of these values will last. *Liberty* or spontaneity is the ability to act in accordance with one's own personality, without having to make an undue effort at self-denial or self-control and without being subjected

* Harvard University.

to undue external constraints. *Equality* of both opportunity and result entails the fairly even distribution of both access to and actual possession of values among individuals in a social system. *Growth* entails the increase of the current stock of any one value. The analysis, therefore, can be conceived as an effort to fill a 32-cell matrix.

We shall not evaluate specific policies or strategies. We shall not try to explain the intentions or reasons for various specific decisions and policies. However, it must be noted that the government has consciously intended to affect each of the eight values in some way at some point. The task, therefore, is modest but important. We propose to identify a body of empirical material which is relevant for making judgments about the value of the Cuban revolution and to put forth hypotheses to help us understand these results.

There has been very impressive growth in enlightenment, skill (except for university trained personnel per population) and power. As for well-being, the performance has been mixed, with growth in some indicators and decline in others. There has been some very modest growth in deference for blacks, though blacks have benefited as part of the improvement of the lower class—but not so much in their quality as blacks. There has also been some improvement in deference toward women. This growth has been most marked in the social, less in the economic, and least in the political spheres.

Affection, understood primarily as private social relationships, has declined. Rectitude, confined also to the private religious sphere, has also declined. But a civic religion, a government-sponsored ideology, is powerful and far reaching. It has probably increased the overall amount of rectitude in the social system. The level of aggregate wealth has declined, or at least stagnated. Economic growth—much sought after though elusive—has been the most conspicuous failure of the Cuban revolution.

There have been impressive gains in equality in enlightenment, skill, and wealth, vertically between social classes and horizontally between urban and rural areas. There have also been gains toward more equality in well-being, though the urban-rural gaps still remain very high. As in the case of "growth in deference," mentioned above, there has been a very modest improvement in equality for blacks, and somewhat more so for women (most in social, less in economic, and least in political spheres). It is not possible to analyze the pattern of equality in affection. In power and rectitude, there has been a considerable degree of centralization in the hands of the government. Competing groups are illegitimate. Decisions are centralized in few hands, often those of Fidel Castro alone. The conclusion seems inescapable that equality on these two values has declined sharply.

Performance on security has been fairly unanimous and positive. There is a reasonable expectation that the current stock on all eight values will last. The record is most mixed with regard to well-being, where increases and decreases in security are recorded. The rise in economic crimes in the late 1960's may threaten the security of wealth,

but increases on other wealth-security indicators overcome this. With no growth, such security is a mixed blessing for some because of the actual decline in wealth, an increase of inequality in power and rectitude, and serious losses of liberty.

The revolution can be most severely criticized for the loss of liberty. Performance is also unanimous, but negative. Even in the area of the government's best performance—enlightenment and skill—one of the chief criticisms is stifling uniformity and loss of liberty. If the 1971 antiloafing law institutionalizes security against unemployment, it is also coercive in every other respect. The private sphere in affection and rectitude continues to exist only under duress. Economic liberty has been lost, because neither strikes nor private entrepreneurship (except for peasants) is allowed. The lack of competition and criticism in the political system is both a loss in liberty and a loss in system competence. It atrophies the capacity for speedy and relatively smooth self-correction or self-steering. And blacks have lost the liberty to be even publicly concerned with deference values.

In sum, the Cuban revolution has not achieved economic development, while it has sacrificed human rights understood as liberty. This is a correct but too one-sided a view of its performance. Growth in revolutionary Cuba has occurred impressively on some values, but not wealth. Equality has also advanced impressively on some values (including wealth), though not in all. An exclusive focus on economic development and human rights may miss other relevant aspects of revolutionary performance.

The Cuban revolutionary government has emphasized four values during these past several years. It has expanded and concentrated power and rectitude; it has sought to deprivatize affection; and it has invested heavily in skill for the long-term future of the country. Although enlightenment has also grown, it was probably derived from the investment in skill. The government invested in the growth of wealth, but failed.

Of the four modes of value enjoyment, the government has been willing to sacrifice liberty. At first, it seemed to be committed to growth, equality, and security; but the commitment to equality faded by the latter part of the 1960's. At this same time, the thrust toward equality in enlightenment, skill, well-being, and deference toward blacks declined sharply. Judgements on equality of affection are not now possible. The inequality of rectitude and power persist. Thus the increase in equality in the late 1960's is limited to greater deference for women in the social sphere, and more economic equality. Therefore, by the late 1960's, no new trends toward greater egalitarianism could be discerned. Gains in equality were secure, but further gains seemed unlikely. The net shift toward greater equality is accounted for almost entirely by the first half decade of revolutionary rule.

The data at hand do not permit us to judge whether greater liberty would have been possible if there had been economic growth. But it seems doubtful. Some of the reasons for the loss of liberty can be

clearly traced to the investment in economic growth e.g., the 1971 antihoarding law. On the whole, however, the loss of liberty can best be attributed to the desire for a considerable centralization and expansion of power and rectitude and the deprivatization of affection on political, social, and moral grounds. The Cuban revolution is committed to the sort of political system which makes liberty, as defined here, quite unlikely regardless of the rate of growth. The political system, not the growth rate, would have to change if the mode of enjoyment is to change.

It can, therefore, be hypothesized that revolutionary, consummatory systems will emphasize power, rectitude, affection, and skill during periods of transition. These are the decisive values. The system will also seek other values, but these four are required. Such a revolutionary system will seek reduction in equality in power and rectitude, deprivatization of action of affection and rectitude, and growth in power and skill. It will be likely to sacrifice liberty. It will probably emphasize equality on other values in its early years both to seek social justice and as a payoff for the political support which brought it to power; but it may or may not continue this emphasis over the long term, depending on other tasks which claim its attention.

Such a political system would welcome economic growth, but the basic features of the system can survive either in the absence of economic growth or in the presence of a very erratic growth pattern. The system would also welcome more growth and equality in enlightenment, deference, and well-being, but these are not essential. In Cuba, neither wealth nor deference has grown significantly; enlightenment has, probably derivatively from the investment in skill; and well-being has had a mixed record.

Finally, because revolutionary systems are expected to be in near constant motion, the pattern of security here described was unexpected. Good theoretical reasons seem to exist for questioning the persistence of security. The record shows, however, a good deal of security of value enjoyment at the present (sometimes reduced) level in Cuba, though it is entirely possible that this will not last indefinitely.

ECONOMIC GROWTH AND HUMAN RIGHTS IN BRAZIL: THE FIRST NINE YEARS OF MILITARY TUTELAGE

*By Brady Tyson**

This is an interim, summary and provisional judgment on the Brazilian experiment of the past nine years, that is, since the military took power on April 1, 1964. To try to give an impression of the results of the interaction among the values of political democracy, equality, and economic growth, and the present levels compared with those of 1964 as well as what appear to be the trends. I have chosen six "indicators":

- (1) the autonomy and integrity of the legal system;
- (2) torture and police brutality;

* American University.

- (3) freedom of the mass media;
- (4) income distribution patterns;
- (5) education distribution patterns; and
- (6) the quality of life of the people of the city of greater São Paulo.

The Autonomy and Integrity of the Legal System: This aspect of Brazilian life was chosen because it is generally through the legal system that many areas of "human rights" are defined, and, to some degree, "operationalized."

From the first week of military rule the Brazilian army declared itself not only above the law, but the source of law, and has in practice been the interpreter of law and the only official expression of the sovereign will of the nation. The Prologue to the First Institutional Act of April 9, 1964, declares:

The victorious revolution vests the constitutive power in the Army. This is the most expressive and radical form of the constitutive power. The victorious revolution as the constitutive power legitimizes itself. . . . This Institutional Act can be issued only by the victorious revolution as represented by the Commanders in Chief of the Armed Forces. . . . [Only] the revolution is empowered to establish the ways and means of constituting the new government and vesting in it the power and judicial instruments necessary. . .

In an unpublished paper on "The Role and Rule of Law in Post-1954 Brazil," Professors Trubek and Henry Steiner conclude that:

The politicization of legal institutions and processes has surely lessened the "legitimacy" of the law in the public eye. "Law" must be perceived by many Brazilians ever more clearly as an instrument of state planning and state power, hardly as a structure of norms and institutions that are designed to afford a degree of predictability and security in private life, and to protect areas of private life from governmental interference. Law at once structures the evolving regulatory and administrative state, and loses its identity into administration.

Professors Trubek and Steiner also conclude that ". . . a decline in the autonomy, integrity and thus inherent legitimacy of the legal system has been one of the prices paid by the regime for economic growth" and that the purpose of the legal system has been radically changed so that, coupled with the activities of the police and military security agencies, law has become an integral part of a system designed to "make potential opponents of the regime fearful of acting in any way that might lead to midnight arrest, etc."

Torture and Police Brutality in Brazil: This particularly dramatic "indicator" is chosen as illustrative of a wider reality—the general concept of the dominant groups of the nature of "human rights," and as indicative of the style of government and conflict resolution.

Two important differences from traditional Brazilian practice have been institutionalized in this area since 1964. First, political dissent, if coupled with any clandestine or mobilizational characteristics, has become the instant object of police brutality, regardless of the social class, reputation, or profession of the persons suspected. Secondly, as

distinguished from mere police brutality, systematic, officially sanctioned scientific torture has become a common and regular practice in Brazil, especially since late 1968, and is almost totally limited now to several military security agencies.

In spite of the absence of certainty given the nature of the problem, we can with reasonable assurance give some statistical dimensions. Probably between 40 to 120 people have been beaten to death, tortured to death, or died in prison from such treatment since 1964, the great majority of them since 1968, and the latest such death of which we know was on March 16th, this year, in São Paulo. If anything, although the rate of torture probably began to decline last year, the number of deaths is increasing. This number does not include the estimated between 200 to 300 people killed by the so-called "Squadrons of Death," usually off-duty policemen, during the past ten years. Probably over 21,000 people have been detained at one time or another for political reasons since 1964. Probably about 1,000 political prisoners are in Brazilian jails at this time; the high of possibly 12,000 was probably in November of 1970. About 2,000 people have been tortured since 1964, and another 2,000 have been the victims of what is usually called "police brutality," but which I am distinguishing from systematic torture.

Freedom of the Mass Media: The question of censorship is considered important because it is a necessary means of social control for governments that are governing against the will and welfare of the majority of the nation in question and the presence and degree of censorship, along with the police repression, presents at least the presumption that the government is afraid of the consequences of a free press and media.

Beginning in 1964 a process of steadily increasing pressure, both formal and informal, has continually narrowed the scope of permissible subjects for discussion in the media. This process has had its periods of greater and lesser pressure, but the general tendency is clear. As Professor Beverly May Carl has written in a recent article on "The Erosion of Constitutional Rights of Political Offenders in Brazil," "a review of the rights still available to the common criminal, . . . shows that, technically at least, an armed robber in Brazil today is in a better position than an editorial writer." What has emerged at the present time is a code of rules promulgated by the government that gives it some sort of "legal" justification for almost any act of prepublication or post-publication censorship imaginable. This is not to say that the Brazilian press is completely muzzled. But it is closely watched, and no more than five or six newspapers or magazines in Brazil today dare to use the freedom to criticize that remains.

Income Distribution Patterns and Trends in Brazil: This topic was chosen because although income distribution patterns are certainly not entirely susceptible to government planning and policy, the government has had a conscious model that it has attempted to realize in Brazil, and because not only the level of income, but the proportionate shares of national income available to various groups are significant determinants of welfare, opportunities, status, and self-esteem. Furthermore,

the nature of the "Brazilian economic miracle" is vitally linked with the patterns of income reconcentration that have become characteristic of Brazil since 1967.

In 1960 Brazilian income distribution was very similar to that in the United States in about 1929, except that the per capita of the United States was about five or six times that of Brazil. But whereas the United States has shown a slow tendency toward more equal distribution, the rapid economic growth that has been characteristic of Brazil since 1967 (averaging about 7% per year, after discounting for the growth in population) has been accompanied by a "reconcentration" of wealth in the upper strata of society. For instance, in 1960 the poorest 40% of the Brazilian population received about 11.57% of the national income, but, according to the statistics of the most recent research, this fell to 10% by 1970. On the other hand, the richest 10% received 39.66% of the national income in 1960, but had increased its share to 47.79% by 1970. Though the interpretation and adequacy of the statistics is always open to some doubts, it seems reasonable to assume that the real purchasing power of the income of only between 30 and 40% of the population has actually increased during the past ten years, and that the bulk of the increase in consumer purchasing power has been concentrated in the upper 10% of the population. Likewise, it is reasonable to assert that the proportionate share of the national income has actually decreased for all but the upper 10%. When all is taken into account (and there are many contradictory indicators) probably less than 30% of the Brazilian people have profited from the economic growth, while about 20 to 25% have suffered some decline in their real wages (the urban poor), while the rest of the population (perhaps 50%) remain at the level of "absolute poverty." Almost all analysts agree that the real minimum salary in 1970 was about 30 to 38% lower than it was in 1960. There are some indicators that the drift downward of the real wages of the urban workers may have been slowed or even, in some areas, stopped, during the past two years, but the data is still too tentative for any firm conclusions.

The process of economic growth that has characterized the Brazilian economy especially since 1967, and that has been so warmly received by the multinational corporations, has tended to increase rather than decrease the distance between the "two Brazils"; the poor majority of about 70 million people, and the relatively prosperous, modernizing sector of 30 million or less people.

Education Distribution Patterns and Trends in Brazil: This "indicator" was chosen because it might show tendencies toward or away from greater equality of opportunity and social equality in Brazil, and thereby tend to confirm or deny the conclusions drawn from the analysis of trends in income distribution patterns. Moreover, the Brazilian army has always shown an interest in education and has placed some emphasis on improving and expanding the educational system.

According to recently released statistics of the Ministry of Planning, enrollment in primary schools has increased by 58% since 1964. But

the school-aged population has also probably increased by 20 to 25%. During the same period enrollment in secondary schools increased 208%, with approximately the same increase in that age group, and, most significantly, enrollments in institutions of higher education have increased an amazing 460% (from 124,000 university students in 1963 to 694,000 in 1972). In other words, the concentration of income in the upper 20 to 30% of the population has been accompanied by the concentration of years-of-education in the same group and the distance between the educated minority and the uneducated majority has been increased rather than decreased as a result of the application of resources by the government.

The Quality of Life of the People of the City of Greater São Paulo: This topic was chosen in part because there are probably more and better statistics for the São Paulo area than for Brazil as a whole; thus the analysis of this data might provide some sort of check on national accounts. But this topic was also chosen because the city of São Paulo, and the south of Brazil is generally looked upon as the chief beneficiary of the process of economic growth in Brazil. Since this economic growth is often used to justify the imposition of a repressive and authoritarian regime, and to justify the claims that the present government is very popular with the Brazilian people who are supposedly sharing in the largesse of economic growth, it ought to be possible to verify these claims to some degree by looking at this "fastest growing city" in the world, the heart of the Brazilian industrial boom, and the center of the richest part of Brazil.

Because the channels of expression of popular dissatisfaction such as labor unions, the press, free elections, etc., (never very satisfactory) have been silenced since 1964, the decline in welfare of the majority of the people of São Paulo has not been adequately noticed. As a result last October, when the newspapers published studies showing that the rate of infant mortality in the city of São Paulo continued to rise, and would last year (for the first time since such records have been kept) be above 80 infant deaths per 1000 live births, many people were shocked. Such an infant mortality rate should not be surprising in a city of about 9,000,000 people, growing at the rate of nearly 500,000 people per year, in which 48.5% of the people live in substandard housing, 60% are not served by a sewage system, and 35% do not have running water. Even though the per capita, monthly income of the city of São Paulo is about \$70 (considerably higher than the average for the whole of Brazil which is between \$40 and \$45), almost half (49.1%) of the people of São Paulo have a per capita monthly income of \$35 or less, or about \$175 or less per family. Sixteen and nine-tenths percent of the families of São Paulo have a monthly income of \$70 or less, or \$14 per capita per month, or about \$170 per year. Real wages in São Paulo for industrial workers dropped over 30% from 1965 to 1971, though there has been a small recovery since. In 1971 it took a worker on minimum salary 113 hours and 26 minutes to earn sufficient buying power to buy his own minimum diet for a month, as determined by the official standards of minimum

nutrition, whereas in 1965 it took a worker on minimum salary only 87 hours and 20 minutes to do the same. In other words, São Paulo is a sick city.

It is a booming city, with perhaps up to 40% of its population enjoying a rapidly rising standard of living, but with the rest of its population participating only marginally in this expansion, and paying a high cost as a result of a policy of not-so-benign neglect. The city of São Paulo is a Westchester County set in the middle of a Calcutta.

President Medici summed up the situation of human rights and economic growth in Brazil very well when he said in 1970: "Brazil is doing very well, but the people are doing poorly." Indeed, the present economic policies of the military government may be far more cruel and far reaching than the systematic torture of political prisoners which it uses to repress and intimidate dissent. The results of the first nine years clearly show that, in the words of Celso Furtado, policies "geared to satisfy the high levels of consumption of a small minority of the population, such as that carried out in Brazil, tend to aggravate social inequalities and to increase the social cost of an economic system." This policy, Furtado continues, leaves "... a large majority of the population living at a physiological subsistence level, increasing masses of underemployed people in the urban zones, etc." The concentration of wealth in the hands of 20 to 30% of the people and the concentration of political power in the hands of less than 1% continues and the maintenance of the pauperism of the great majority of the Brazilian people has become state policy. While the population is expanding, there is no equivalent increase of Brazilians actively sharing in the market of consumer goods. Consequently, it would seem that the denial of political liberty and constitutional government has produced no significant gain for the overwhelming majority of the Brazilian people; the Brazilian army has, perhaps unwittingly and unknowingly, been made the guardians for a dynamic but highly exploitative economic system, favoring a small minority of the nation. Political repression and economic exploitation thus go hand in hand. Brazil is creating a Scandinavian-sized consumer economy superimposed on an Indonesian-sized pauperized mass, presided over by a cruel and increasingly isolated army.

ECONOMIC DEVELOPMENT, POLITICAL DEMOCRACY, AND EQUALITY: THE CHILEAN CASE

*By Francisco Orrego-Vicuña**

The goals of economic development, political democracy, and equality, which are the three values suggested for discussion at this meeting, share a close relationship. Although the guidelines for discussion prepared by the organizers of the meeting reveal certain doubts about the

* The University of Chile

compatibility of these values, at least as coexistent parts of a common process, my own point of view is that they are not only compatible but also inseparable. The crisis of a society emerges precisely when any one of these values is abandoned or subordinated to the attainment of the others, either in the case of a developing or of a developed country. The relationship of balance will, of course, depend on the particular circumstances of each country, its stage of political and cultural development, and the definitions adopted with regard to those values. This is why the developments taking place throughout the world cannot be judged by applying theoretical models or standards inspired by the realities of developed countries, which is the frequent mistake of many scholars and government officials.

These considerations must be taken into account when examining the very complex case of Chile. The three above mentioned values have traditionally formed part of the Chilean political system, providing the stability which has characterized social and institutional developments. The emphasis on one or another value has been different in particular historical periods, but the basic relationship of balance has always been present. This was achieved by means of a truly national political thought which did not need to have recourse to international models of any kind; in the few occasions in which any such foreign model was introduced in the Chilean political system, such as parliamentarism, the short term result was a violent crisis, specifically a civil war.

The situation changed radically when the government of the coalition of Marxist parties was inaugurated in 1970. As in every revolutionary process, particularly if directly inspired by the teachings of Lenin, the sole and exclusive goal is to ensure that all power is concentrated in the hands of the state; all other values are subordinated to the achievement of this basic goal. This fact alone determines that the relationships among the three mentioned values are subject to fundamental alterations, at least while the taking of power is completed. It is also the common characteristic of all Marxist revolutions.

The functioning of the Chilean way to socialism has to be examined within this perspective. The goals of the revolution and the ideological grounds of the government, which is scientific Marxism, are not significantly different from those of any other Marxist revolution. However, the process in Chile is thus far clearly different from others. These differences may be explained by the historical circumstances of the emergence of the process in Chile. One basic difference is that power was reached by democratic elections. But of greater importance is the fact that the society and its values were in full operation when the Marxist coalition took office. There was no war or dictatorship, political parties and unions were fully organized, the armed forces kept their institutional integrity, and, in general, citizens were fully aware of their rights and freedoms.

These factors have had a decisive influence in keeping the value "political democracy" in full operation, a situation which is not likely to change in the future. However, the kind of democracy about which the Marxist parties speak is not the same as has been traditionally prac-

ticed in Chile. These parties assign no priority within their basic policies to the traditional system, for it is considered a bourgeois democracy in which Congress has no representation, and courts apply a discriminatory justice between classes. In their view the whole bourgeois legal system ought to be replaced by the revolutionary law, the Peoples Assembly, and popular tribunals. The important issue is that democracy as practiced in Chile prevents the concentration of the totality of power in one single hand, and this is incompatible with the basic revolutionary goal of taking absolute power. Notwithstanding this position of Marxist parties, the society is built upon organized groups, among them the armed forces, which are able to impose the practice of democracy in its real sense. Therefore the most relevant aspect of the Chilean way, which is the democratic process, is not considered essential in the Marxist approach; it has been imposed by the majority of the Chilean social forces and it is accepted because Marxists have no other alternative for the time being.

This problem does not arise only in the case of a Marxist process or a developing country. Any man in power, whatever his ideology, is bound to become a dictator if the social forces of that society are not capable of exercising countervailing power against the state for the benefit of a balance that will protect the rights of the individual. Democracy does not function just because the constitution provides for it; it works because the society and the diversification of power within it so require. In the case of Chile, democracy must not be taken for granted. It results from a constant effort to control those factors which pursue its destruction, from either the extreme right or left.

In theoretical terms and in practical application the value of equality is difficult to define. No society has achieved absolute equality, either in terms of income or of power. The mere fact that individuals have different capabilities determines a natural inequality. However, we may assume that one important manifestation of this value is the equality of opportunity which the society offers and which the individual may or may not take advantage of in accordance with his own capability and dedication. From our point of view, this can only be achieved in a democratic society which does not discriminate between social classes. Class struggle is an essentially discriminatory instrument which in part explains why the concept of democracy within a Marxist perspective is fundamentally different from that of western cultures. Another important manifestation of equality is the redistribution of income in accordance with proportional and progressive standards.

Efforts toward ensuring equal opportunity are not new in Chile. Perhaps the most significant developments in this respect were the measures undertaken by the Frei Administration in the field of education and training. However, many obstacles were encountered due to the paternalistic approach that was followed. First came the paternalism of political parties, and now that of the state. The achievement of equal opportunity is incompatible with any kind of paternalism, for the latter places the individual in the position of receiving those benefits which

are granted at the will of the authorities. Thus the individual is not trained to struggle to promote and protect his benefits and rights. Only a process of participation at every level, enabling the individual to share the decisionmaking process, is capable of ensuring equal opportunity. Until now no government has fostered such participation because it would limit the political, economic, or state power. Furthermore, Marxist parties have declared their opposition to any form of participation other than that channeled through their own structures.

The most significant achievement of the government of Popular Unity has been the massive redistribution of income, largely through increasing salaries and wages. From the point of view of strict justice, this is indeed a positive element. However, to a large extent the economic effects of this policy cloud the real impact of the goals pursued. The working classes would benefit more if distribution were conceived as an element of sound economic policies, but so far the purpose of redistribution has been mainly political, that is, to transfer power from one sector to another within the society without regard to the overall economic results.

Within a strategy of consolidation of political and economic power, economic development as such is not a priority value. The total conception of society and the role of the state that characterizes Marxist thought requires first gaining control over all the elements and tools of power which, at a later stage, may be applied to achieve economic development. The construction of a socialist state is basically a political process, and the case of Chile is no exception. This explains the serious economic problems that Chile is now confronting which, although due in part to external factors, are more significantly the result of the allocation of national priorities. There is no need to go into detail concerning the facts of this economic situation; suffice it to say that according to ECLA reports for 1972, Chile had the second lowest rate of economic growth in Latin America, ranking behind Haiti and slightly ahead of Honduras.

The relationship between the economic factors and other values has a strong bearing upon the question whether their simultaneous accomplishment is possible. Democracy and economic development are so closely related that the exercise of real democracy is not possible without a minimal economic stability. For the individual to enjoy political freedom he must be assured of a basic economic security. When the individual is dependent on a single source of work, such as the landlord or the state, his right to a free vote and to the secrecy of the ballot box will perhaps not be affected. But democracy is not restricted to balloting; it also comprises freedom of political action and participation in decisions and these might be seriously affected if the individual fears the reprisals of his employer and lacks any economic alternative. This aspect of democracy has never been adequately safeguarded in Chile and the total control by the state of employment and distribution of supplies would certainly not improve the situation.

In addition to its links with democracy, equality also has a close relationship with economic stability. For the policy of income redistribution to accomplish its function of social justice, it must necessarily bring about a real increase in the economic power of its beneficiaries, and not merely an increase in the amount of money they have. The important salary increases that have taken place in Chile have lost much of their significance because of an accelerated inflation, which in the last twelve months has reached 280%. This acts as a permanent tax for which cost of living allowances are inadequate compensation. Also, when the poor performance of the mechanisms of supply prevent income from satisfying the basic needs of a family group, the scope of redistribution is very narrow. Therefore, it is not enough to conceive of redistribution as a tool to deprive one group of its high income; it is also necessary to assure a real improvement in the conditions of those most in need. However, when the goals are basically political, *i.e.*, those of class struggle, only the first aspect is taken into consideration.

The final outcome of the Chilean way to socialism will depend on the manner in which all these values are combined. If the values of democracy, equality, and economic development are kept within reasonable balance, the chances of success are fairly good. The country is not divided so much between those who favor and those who oppose socialism, because even important sectors of the opposition are in favor of basic socialistic goals. The divisions are over the procedures for implementing such goals. It is most unlikely that the majority of the country would accept postponement of democratic or economic development. Such a course would produce a deep confrontation. The economic difficulties already mentioned are a source of major concern since they evidence a broken balance. This is one aspect that requires priority in governmental planning. Moreover, democracy, the voice of the people, has to be heard with regard to the kind of economic system to be developed and the limitations upon it.

COMMENTS

*By Lincoln Gordon**

Our four speakers have discussed the concept of human rights with various degrees of refinement. They range from the broad goals of political democracy and equality through Professor Trubek's classification of economic, social, and cultural rights alongside of the classical political and civil rights, to Jorge Domínguez' 32-cell sociological matrix, which goes so far as to estimate the quantity of "rectitude" in Cuba before and after the revolution. I admire Professor Domínguez' methodological effort, but would prefer not trying to push it that far. I also felt

* Fellow, Woodrow Wilson International Center for Scholars.

that Professor Trubek took too seriously the use of the word "rights" in constitutional and other formal documents when what is really meant is goals or aspirations. Many of the so-called economic and social rights are inherently unenforceable through any kind of systematic legal procedure. Like Franklin Roosevelt's "four freedoms," equating them with juridically enforceable rights should be recognized as a kind of poetic or political license rather than a feature of the legal scenery. I am all in favor of stating social goals and aspirations, but it would be well to avoid confusion in the terminology.

I would like to focus on the three broad and overlapping concepts referred to by all four of our speakers and emphasized by Professor Orrego Vicuña, i.e., (1) political democracy and civil liberties; (2) social equality; and (3) economic development.

Looking at the three countries under discussion for evidence of positive and negative correlations among these three desirable goals apparently proves practically nothing, as Professor Trubek suggested. To use his metaphor, it may well be that omelets cannot be made without breaking eggs, but it is certainly possible to break eggs without producing an omelet.

The case of Brazil demonstrates that rapid economic growth is possible without civil and political liberties and without increasing equality. The Cuban case demonstrates that the destruction of civil and political liberties is possible without producing economic growth. (Whether the regime is still producing greater equality since the first flush of the early 1960's seems to be unclear, as Professor Domínguez pointed out.) The case of Chile does not prove anything yet, since the only certainty is that the present situation is unstable. In saying that, I do not mean that the regime will necessarily fall apart before the end of President Allende's constitutional term of office. But if it holds together, the next three years will probably be a kind of political standoff coupled with economic stagnation. I would then expect a decisive move after the 1976 election either to a totalitarian Marxist form of socialism with the loss of political democracy and civil liberties or back to a mixed system with a secure role for a substantial amount of private enterprise and reenforced constitutionalism. And it is clearly possible that the institutional crisis will not await the 1976 election. If any conclusion emerges from these three cases, it may be only that a high growth rate, at least at a particular stage of development, may require a temporary move away from equality in income distribution, possibly as a transitional phase.

This is one of the six issues in Brazil on which Professor Tyson focuses attention. He raises the question whether economic growth there in the last nine years, mainly in the last four or five, has been so lopsided that for the mass of Brazilians it has failed to improve or has perhaps even worsened their economic welfare at the same time that their civil and political liberties have been eroded or destroyed. He speaks colorfully of the nation as a Scandinavia imposed on an Indonesia and of São Paulo as a Westchester County in the middle of a Calcutta. In

my view, both these images are so exaggerated as to be grossly misleading caricatures. Even thirty to fifty percent of Brazil would be a very large Scandinavia, and I am forced to assume that he has not seen Calcutta at first hand, as I did two years ago.

Professor Tyson has joined a number of other commentators, including some at the World Bank, in drawing a very far-reaching set of conclusions from the small and extremely dubious statistical base of the sample censuses of 1960 and 1970, which are the only source of quantitative information on income distribution. For those who can read Portuguese, including Professor Tyson, I suggest a close reading of the analysis of this issue in the book entitled *Brazil 2002* by Mario Henrique Simonsen. Even between 1960 and 1970, the absolute position of the poorest 40% probably held its own on a per capita basis, notwithstanding a 33% increase in numbers. Moreover, a serious analysis would have to discriminate among the three phases within that decade: the stagnation and inflation of 1961–64, when the position of the poorest 40% almost certainly deteriorated; the stabilization period of 1964–68, when without doubt real wages did decline and income distribution became more concentrated; and the growth takeoff period since 1969 which still continues. In the last two or three years, real wages have clearly been increasing.

Nor does the Tyson image of half the people virtually outside the market economy square with my understanding of the facts. It is also unclear to me that tripling high school enrollment and almost quintupling university enrollment necessarily concentrates education in the top income groups. It might equally serve to expand educational opportunity and upward mobility for the talented poor, especially those who live in the cities.

The Brazilian record on political and civil liberties has been very poor, especially since 1968. I have no desire to defend it and have indeed criticized it in published writings. But the economic growth is a real phenomenon which should not be underestimated. In particular, the successful solution of the foreign exchange bottleneck and of the domestic savings and investment bottleneck to economic growth is a major achievement. The sectoral composition of the growth has been broader than Professor Tyson suggests. There is also substantial evidence that improved income distribution, both regionally and socially, is becoming an important part of the continuing economic boom, not just as a distant aspiration but as a current reality.

Could Brazil have achieved high economic growth rates without abandoning political democracy and civil liberties? Thomas Skidmore, the well-known historian of contemporary Brazil, is persuaded that it could not. My own view—and this is applicable to many countries in addition to Brazil—is that these two aspects of human rights should be considered separately.

Civil liberties are basically a means of protecting the individual citizen from arbitrary governmental kicking around. Democracy provides effective popular participation in the selection and removal of the governors.

In the very long run, the preservation of civil liberties may well require the presence of political democracy, but for quite long transition periods, I believe that a self-perpetuating government can coexist with civil liberties. The case of Mexico over the past three or four decades approximates that model. Starting from the other end, Yugoslavia has been struggling toward this end since its political split with the Soviet Union in 1948. From time to time, the process has involved backsliding on the civil liberties side, as presently appears to be happening. But it has involved a real effort to introduce substantial civil liberties, with no desire whatever to introduce political democracy.

In my opinion, if the revolutionary government in Brazil had set about building a new political infrastructure in 1964 and 1965, it would have been able to achieve substantial economic growth without the repressiveness of the past decade, and especially of the low years of 1968-70. But the question of the future in these three countries is more interesting than the past.

A good test of the status of civil liberties is to ask how a dissenter from all three present regimes would fare in each of the countries. Clearly he would be best off today in Chile; he would be less well off in Brazil; and he would be worst off in Cuba. What can one project for the period five or ten years hence?

For a dissenter to be better off in Cuba would require a massive omelet unscrambling through a counterrevolution. Otherwise one might conceivably envisage a very long evolution of decentralization of power and autonomy for socialized enterprises to the point where they approximate private enterprise in socially minded countries like Sweden or Holland. That process, however, would take many decades. The cardinal requirement for protection of human rights is that there not be a monopoly of centralized power—a single control of all employment opportunities, all education, all communications media, all mass meetings, or even small group meetings. The issue is not one of private or state ownership of the means of production in the classical antithesis between socialism and capitalism. Both liberal socialism of the Scandinavian or New Zealand or German type and capitalism under substantial social control, as it is in most of Western Europe and North America, avoid such a centralized monopoly of power. They remain open societies and by general world or historical standards they protect civil liberties on balance very well. They are certainly not perfect, as we in the United States are well aware. Marxist socialism, on the other hand, with its monopoly of power in a centralized Communist party, does not protect civil liberties and the system does not readily lend itself to doing so. It may or may not provide greater equality. Greater equality is possible within some limits in all systems, although the equalitarian utopia suggested by Professor Rawls of Harvard may well be unachievable in any. It follows that the prospects in Chile depend on how the crisis already mentioned is resolved, whether in 1976 or before.

In Brazil, economic power remains quite widely diffused and the regime seems to want to keep it that way. I believe that it is both

possible and desirable for the government to proceed now to restore civil liberties progressively even though it may want to defer democratic control for a further period of time. Whether the Brazilian regime will do so or not is not preordained by any immutable laws of social dynamics. Three years ago, Professor Huntington of Harvard was contending that a military dominated regime could not be successful at economic development. That hypothesis has now been disproved. Some others now claim that civil liberties in Brazil are doomed in perpetuity. It could equally be argued that the aspiration for rule of law and western standards of justice retain sufficient vitality in Brazil so that as economic development continues and the clientelistic political leadership of the 1945-64 era passes off the stage, those values may be successfully reasserted. Personally I hope so, but I would not feel confident in making a prophecy.

THE EPOCH OF SOCIALISM AND THE INTEGRATION OF WORLD CAPITALISM

*By Howard M. Wachtel**

The topic, "Economic Development and Human Rights," can best be understood in the context of the broad historical forces now gripping the world. On the one hand, we are living in the epoch of socialism which is the great social force propelling social development today. This has been so for the past 55 years, much the same as capitalism once dominated the world in the 18th and 19th centuries. Ordinary people in country after country have risked life and limb in their struggle for a better society under the banner of socialism, led by political movements of national liberation and socialist development. We find few historical examples of people spontaneously organizing themselves in sharp conflict with more powerful opponents whose political program embraces the construction of capitalism. For the most part capitalism must purchase its soldiers in much the same way as it transacts any business on a money market. We find few pieces of prose or political writing in capitalist less developed countries which grip our imagination. Who are the heroes of capitalism to compare with people like Ché Guevara, Franz Fanon, Mao Tse-Tung, and Ho Chi Minh? And the list of countries embracing the socialist road to development grows every year, from the first socialist revolution in the Soviet Union to Chile's efforts at the construction of socialism today.

Aligned on the other side of this historical struggle is the increasingly powerful and intensely integrated world capitalism under the leadership of the United States. The end of World War II signaled an end to armed conflict among capitalist powers and placed at center stage the confrontation between socialism and capitalism as a world system (with the United States at the helm). Initially led by international organiza-

* Associate Professor of Economics, The American University.

tions and international monetary arrangements, the benefits of which inhaled disproportionately to the United States, the integration of world capitalism has now entered a new phase under the leadership of America's multinational corporations.

These are the great dialectical forces at work in the world, producing the struggle between the increasing number of countries following the socialist road to development and the receding, though still powerful, force of integrated world capitalism under the leadership of the United States.

Only in this context can the question of human rights be understood. The actors in this dialectical conflict consist of ordinary people in political movements in many countries of the world, confronting America's gigantic and deadly military machine. Cornered like a wounded tiger, world capitalism (and particularly the United States) has no choice but to bite and scratch with any means at its disposal. It can try to avoid its inevitable image by heavy investment in public relations and by the creation of subimperialist powers (like Israel and Brazil) to do its dirty work, but eventually it must take to the battle directly as in Vietnam. With this set of forces at loose in the world, it is no wonder that human rights suffer. Each new revelation in our newspapers about war crimes, private corporations trying to buy elections in other countries, or scandals at home, breed more and more mass estrangement from our own shrinking residue of human rights.

It is in this context that the several papers before us can be analyzed. Domínguez, in his analysis of the Cuban revolution, has compiled some interesting data. In some instances he stretches the data almost to the breaking point, as, for example, in his counting nonwhite faces in photographs of meetings of the Cuban legislature to learn about their role in Cuban society today. I find also his sweeping conclusion that there is a decline in interpersonal affection in Cuba to be without any foundation.

If some of Domínguez' conclusions regarding the Cuban revolution are based on scanty data, the conclusions of Vicuña on the Chilean case are based on virtually no serious scientific evidence at all. This is the sort of ad hoc reinforcement of subjective prejudices that a teacher has to warn all students about, starting from their freshmen days to the completion of their doctoral dissertation. In examining the relations among economic development, political democracy, and equality, Vicuña asserts that the sole and exclusive goal of the revolution is to ensure that all power be concentrated in the hands of the state; all other values are subordinated to the accomplishment of this basic goal. Because of this, he argues that economic development cannot take place and equality and political democracy suffer. But where is the evidence?

In fact, if we study the history of economic development in this century, it has been the socialist countries of the world that have developed and those members of the Third World that have adopted capitalist

institutions have not.¹ I simply invite you to compare China and India. Socialism, in nearly all instances, has meant a broadening of citizen participation in aspects of life that transcend the mere ritual of voting for two competing capitalist candidates for political office. Most significantly, every socialist revolution since World War II has involved bold new experiments in industrial democracy (the participation of workers in workplace decisions) while capitalist relations of production remain as the dictatorship of the managerial class that they have always been.² With an ever-expanding sector of collective consumption in planned socialist economies (such as schools, health, old age security, day care, culture, and recreation, and so on), real economic equality is enhanced, especially when coupled with the enormous inequality in income that is eliminated when the return for the use of productive property ceases to be the reserve of the privileged few.

Tyson's paper on Brazil, in contrast to Vicuña's on Chile, represents a most carefully documented account of the decline of human rights in Brazil. His account of the erosion of the integrity of the legal system coupled with the increase in incidences of torture and police brutality paint a dim picture. Most significantly, income distribution has become more unequal in Brazil even though the country has achieved substantial growth rates. The inference one draws from these data is that the fruits of economic growth have been obtained "out of the hides" of workers and peasants in Brazil for the benefit of the small segment of society with favorable status in the political regime.

While Vicuña starts with an answer to the question about the relationship between human rights and economic development, Trubek devotes most of his attention to defining the parameters of the question itself. In so doing, his exposition is quite precise and therefore of great value to all of us in sorting out our own thoughts on the question. He takes care to explain what he means by human rights, including, "classical political and civil rights . . . as well as economic, social and cultural rights . . ." Along these dimensions he hints that perhaps Chile and Cuba should receive better marks for their achievement of human rights while suffering a somewhat lower growth rate than Brazil which ends up with poorer marks along these dimensions of human rights. (It may

¹ For comparative rates of growth and development, see Branko Horvat, comments in 60 *AMER. ECON. R.*, 323-24 (1970); Branko Horvat, *Relation Between Rate of Growth and the Level of Development* (International Development Research Center, 1972). Annual growth rates are published in International Bank for Reconstruction and Development. *WORLD BANK ATLAS* (annual publication).

² Illustrative of these developments in Yugoslavia, China, and Algeria are: H. WACHTEL, *WORKERS' MANAGEMENT AND WORKERS' WAGES IN YUGOSLAVIA*, especially chaps. 4 and 5 (1973); P. BLUMBERG, *INDUSTRIAL DEMOCRACY: THE SOCIOLOGY OF PARTICIPATION*, chaps. 8 and 9 (1969); B. RICHMAN, *INDUSTRIAL SOCIETY IN COMMUNIST CHINA* (1969); E.L. WHEELWRIGHT AND B. MCFARLANE, *THE CHINESE ROAD TO SOCIALISM* (1970); T. L. BLAIR, *THE LAND TO THOSE WHO WORK IT* (1970); I. CLEGG, *WORKERS' SELF-MANAGEMENT IN ALGERIA* (1971).

be too early to evaluate the growth results of Chile which has been in its phase of socialist transition for a very short time and is operating under severe international constraints.) It is curious that, although the United States professes to support human rights, it has opposed the constitutionally elected Chilean Government while supporting lavishly with billions of dollars a repressive regime in Brazil which came to power via a military coup.

In reading Trubek's paper one element of the problem became clearer to me. That is, the definitions of human rights are all stated with reference to a capitalist economy (such as the United States) operating within a regime of what Marxists call "bourgeois democracy." But what if we place ourselves within a socialist context? How do we define human rights in such a society? For example, in most socialist countries it is illegal to employ more than five people as wage laborers working for someone who owns and reaps the rewards from private capital. If we were to include such considerations in the definition of human rights that seems to pervade this panel, we would end up with vastly different evaluations of the results of socialist and capitalist economic development. This is an important issue, because nearly all the socialist economies have far greater industrial democracy built into them than do capitalist economies. However, by restricting our criteria of human rights (as Trubek does) to formal voting within parliamentary systems, such considerations are lost. The tendency towards ethnocentric visions of human rights are seen most clearly from Trubek's summary of Dean Rusk's astoundingly restrictive comprehension of what human rights are. For example, Domínguez, in his discussion of Cuba, takes all of his criteria from U.S. experience. By way of contrast, the 1963 Yugoslav Constitution proclaims as an "inviolable foundation" the "self-management by the working people in the working organization . . . so as to assure the direct participation of the citizens in the determination of the course of social development" Were we to include this criteria in our definition of human rights, the evaluation of Cuba and Chile would be different from the conclusions reached by the members of this panel.

In concluding these brief comments, let me return to my original theme—that of worldwide dialectical conflict between socialism and integrated world capitalism. When such direct and overt struggles are at center stage, human rights suffer. The source of the diminution in human rights emanates more from the side of the struggle whose empire is shrinking than from the side whose forces are gaining adherents. Thus, the United States is forced into the position of defending capitalism at all costs much the same as previously receding world powers tried to defend their dwindling turf. In such circumstances whatever few rules of fairness existed before are slowly eroded, so we as a people have been conditioned to tolerate the massive use of antipersonnel weapons, chemical, biological, and geophysical warfare, and carpet bombing of civilian areas which only decades ago would have been considered too monstrous for even the worst of tyrants. By the same

token we accept mutely the revelations of how multinational corporations intervene in the political affairs of other countries and manipulate international money markets for their own advantage at the expense of ordinary citizens who get caught in the middle of their financial speculation.

For the future, if my formulation is right, we can expect even more assaults on human rights in the name of system preservation. But I take hope from the fact that ordinary people all over the world seem to have vast capacities for coping with such situations in order to establish more equitable and human societies. The future of human rights rests on their shoulders and on the shoulders of those who support them.

Following the presentation of the papers, Chairman FERGUSON opened up the discussion to the floor for questions and comments.

Q. Can Chilean President Allende overcome the temporary dislocation of economics from the traditional balance between economic growth, political rights, and equality?

Professor ORREGO-VICUÑA observed that the outcome of the present imbalance among values will depend on a definition of policies by the government. Its intervention into some industries, for example, is not of great economic importance to the socialist government; rather, the government is forced by the political parties to intervene for ideological reasons. This intermingling of economics and politics is self-defeating. If ideology continues to influence major economic descions, things will get worse. But if the government resists blind dogmatism and consolidates economically, the situation will improve.

An objection was made from the floor to Professor Tyson's derogatory references to Calcutta. It was observed, first, that Calcutta is not all of India and that one should not describe India by reference to one city; and second, that India is a good example of a country which did adopt a socialist economy while retaining the same political and civil rights enjoyed by the United States. India shows that socialism and democracy can function simultaneously.

Q. Should not governments be more concerned with quality of life rather than human rights or equality?

Professor WACHTEL noted that quality of life entails respect for human rights and equality. In many countries with lingering material deficiencies, the quality of life must be coupled with procedures to equalize distribution of income and by broadening participation—again, not just at the election level, but also in industry and at schools.

Professor ORREGO-VICUÑA felt that "quality of life" could not be defined clearly. Ghettos and slums exist in developed and underdeveloped countries, in capitalist and socialist states, and under democratic and authoritarian rule. It is impossible to ascertain in which ghetto the people are happiest. While agreeing that broader social participation was indispensable to human rights protection, Professor ORREGO-VICUÑA rejected any universal panacea (such as the socialism proposed by Professor Wachtel) for all countries without first looking at the particulars of the countries involved.

Q. What should a government do when faced with a decision to sac-

rifice either economic growth or political rights? The Indian and Chinese experience illustrate the results of opting for one course at the expense of the other.

Professor TRUBEK reiterated his thesis that the premise that one element must be sacrificed in order to attain the other has yet to be proved. There is no historical justification for the conclusion; the most that can be done among parties disagreeing over the issue is to trade examples back and forth. He repeated that scanty evidence prevents generalizations in this area.

Professor TYSON agreed and cited the recent remarks of a former Chilean Ambassador to the United States:

There is no room for illusions. It is already too late for any Latin American country to emerge from underdevelopment through a production system simultaneously based on capitalism and Democracy. The dilemma is now as hard and clear as a diamond: Either to sacrifice political liberties and labor rights—Democracy!—so that capitalism may be able to operate according to its laws and inherent motivations (as occurs in most of Latin America, but for how long . . .?), or to substitute capitalism and its political power structures by new institutional and economic forms based on the organized and responsible participation of the people and the workers. It is more than likely that the dilemma imposed by history on the Latin American countries for the remainder of this century will no longer be between capitalism and socialism, but between totalitarian, dictatorial and oppressive socialism, or communitarian, pluralistic and self-managing socialism. Whoever fails to understand this will be working against history and against the essential interests of Democracy in Latin America.

An observation was made from the floor that Professor Tyson's condemnation of Brazil's failure to equalize income distribution was misleading. No one is in favor of redistributing poverty. The current regime is merely creating order out of chaos, establishing work incentives, and providing equal opportunities. Moreover, income redistribution will benefit no one unless the rate of inflation is reduced. Support was voiced, however, for Professor Tyson's assertion that torture has been committed in Brazil by both the police and the military.

It was noted from the floor that cultural arrogance pervaded the panel and could be seen by the underlying conception, choice of indicators, definitions, and standards of measurement. It was pointed out that civil and political rights have different meanings in different social systems, and that this fact will be missed by interpreting rights solely from the western viewpoint. The panel's conceptions might prevent, for example, its realizing that the judicial mechanisms in Ceylon, China, and Cuba are very similar to our own public defender system.

Professor TRUBEK responded by noting that his selection of particular human rights, as well as his classification of them, derived from existing international agreements which can be used as some type of standard. However, he had sought to get away from the formal documents and into the problems they raised.

Q. Do the economic aspects of American foreign policy toward the Third World seek to preserve capitalism or further democracy?

Mr. GORDON first took strong exception to Professor Wachtel's persistent notion of the conflict between capitalism and socialism. He noted that the doctrine was simplistic and had been discredited long ago. With respect to America's foreign policy, Mr. GORDON felt that the United States had no clear-cut philosophy toward development, although a State Department document on the subject is currently underway. Several observations were possible, however. First, the term "Third World" is objectionable because it connotes an element of homogeneity which, as the papers presented this afternoon indicated, is not an adequate representation of reality. Secondly, strategic considerations do play a predominant role in some situations, such as the U.S. policy toward Greece. Finally, one cannot generalize. In some cases, the main goal has been economic development; in others, it has been to preserve democracy; in still others, to defend presumed strategic interests. The preservation of "capitalism" as such has not been an objective of high priority in the less developed countries.

MICHAEL L. MICHAEL
Reporter

MINING THE RESOURCES OF THE THIRD WORLD: FROM CONCESSION AGREEMENTS TO SERVICE CONTRACTS

The roundtable was convened at 2:40 p.m., April 14, 1973, Haliburton Fales II,* presiding.

The CHAIRMAN observed that the focus of the discussion was on the evolution of concession agreements in both the oil and hard mineral areas. The CHAIRMAN explained the absence of a scheduled panelist, M. Nordine Ait-Laoussine,** who was recalled to Algeria by his government. The CHAIRMAN stated that the remarks of the panelists expressed their individual views, not those of the organizations they represent.

REMARKS BY DAVID N. SMITH***

I would like to begin this discussion by providing a framework for a general analysis of the concessions problem. If one were to take a look at the general literature relating to concessions in the late 1940's, 1950's, and early 1960's, one would obtain a very special view of concessions in that literature. This view was shaped, to some extent, by the sociology of concessions knowledge. Most concessionaires and most

* Of the New York Bar.

** Société Nationale Sonatrach.

*** Harvard Law School.

concession-giving countries have traditionally held their concession agreements very close to their vests, and it has until recently been extremely difficult to obtain copies of actual agreements. Consequently, those academics and others who wrote about concessions in the 1940's, '50's, and '60's found that they had very little to write about except the traditional lawyer's concern for sanctity of contract, choice of law, and arbitration. With regard to the latter topic it might be observed that never has so much been written by so many for so few because, as we all know, concession agreements seldom come to arbitration. One reason is that the arbitration clause usually deals with the sort of disputes which are not at the heart of most country concessionaire conflicts.

The old conceptual framework from which people viewed concessions generally had three or four elements. First, the concession was viewed as a two party agreement between the host country and the concessionaire. Second, it was viewed as a contract in the formal sense, much like a sales contract in the United States. Third, it was seen as a zero sum arrangement in which one party wins and the other loses on specific issues. Fourth, the old concessions analysis was, by and large, isolated from industry structure and from economic analysis. The old concession analysis (and indeed it is not very old since it has lasted into the 1970's) is highly unrealistic. There is today a need for a new conceptual framework, if one is to understand what is going on in this field.

I would like to present three or four subject areas that might provide the beginning of a new conceptual framework. First, the concession must be seen not simply as a contract, but as a process in which the rights and obligations of both parties shift over periods of time as specific factors change. The contract is important, but it must be seen only as a starting point in an unfolding relationship. One of the negotiators in the Liberian LAMCO contract some years ago described it as simply an invitation to the dance and in many ways that is a very appropriate analogy.

Second, with regard to the actors involved in the concessions process, it is clear that the contract is more than a simple two party arrangement. One may start with the host country and the concessionaire, but new entrants who come into the industry in later years may affect the two-party concessions policy. The new terms in a second country with a new entrant may affect the previously negotiated contracts elsewhere. In addition, the consuming country, *i.e.*, the country which consumes the oil or aluminum or copper or other resource, is itself an actor within the concessions process. Professor Adleman of MIT has suggested in a recent article in *Foreign Policy*, for example, that when Libya first decreed oil production cutbacks in 1970, the United States could easily have intervened to work out an insurance scheme whereby an American company in Libya could have indeed stopped production, but have drawn crude oil from other sources in other countries. The United States, however, has not opposed the OPEC cartel arrangement. Also, consumer country policy toward pollution may affect the arrangement between the concessionaire and the host country. A

few years ago Venezuela entered into a new arrangement with Esso and Shell by which it lowered taxes because of pollution controls which were being introduced in the United States.

Third, the concession arrangement is often a non-zero sum arrangement. That is, on many issues it may not be a question of the host country winning and the concessionaire losing, or the other way around, but rather it may be a situation in which both the host country and the concessionaire win. Again, one must consider the role of the consuming country. With the increase in taxes imposed on the oil companies in the Middle East and North Africa, for example, the oil companies themselves have not necessarily been the losers since the increase in taxes can be passed on to the consuming country in terms of higher payment for the oil. In this case it is conceivable that both the host country and concessionaire can win.

The fourth factor I wish to mention is that it often appears to those who come casually into the concessions picture that the rules of the game are constantly changing, and, indeed, concessions do alter over time. There are, however, certain systematic influences in this area. One way of seeing how these factors operate is to recognize that the structure of each particular industry, to some extent, shapes the way in which the concession is going to unfold. With regard to oil, for example, the major oil companies for a long time controlled the refineries and the market, kept newcomers out, and kept prices high. In more recent years, newcomers have been able and eager to negotiate new packages of terms with the host countries. Because of this, the old leaders have had to revise their contracts to accord with the new terms being negotiated with new entrants.

If one takes a good look at the copper industry, however, one sees a very different picture. The copper producers have been much more inhibited in meeting the new demands of the host countries for higher taxes because these producers have feared that, given higher copper prices, other metals might be substituted for copper in the consuming countries. Also, the technology involved in the copper industry has been somewhat less complex and much less expensive than the technology in oil and, within the copper industry, the leaders have not controlled the fabricators. Consequently, new entrants could come in. Because of these three factors, developing countries have been able in certain instances to nationalize their copper industries, while it might not have been possible for them to do the same in regard to oil. In Chile, the Congo, and Zambia we have seen examples of nationalization.

With regard to aluminum, production demands huge smelters and access to large sources of electricity. Because of this, developing countries have not been able to enter easily on their own into the aluminum industry. They have had to rely on the existing leaders in that industry. If one looks at the history of nationalizations in various industries, one sees that aluminum is very low on the list. I think there has been only one nationalization of an aluminum complex, in Guyana, and that is a case involving a very special type of bauxite.

Finally, I suggest that in looking at the evolution of concessions policy and concession arrangements, one should not be deceived by labels or by forms. The modern day service contract, production-sharing agreement, or equity-sharing contract may not be at any higher stage of evolution than the straight concession. It may simply be a new label. The host government is not necessarily going to make more profit from a service contract, a production-sharing agreement, or an equity-sharing agreement than it did under the old concession arrangement. The label is not the important thing here; it is the structure of the agreement and the fiscal arrangements within that agreement. I do not believe that there is a natural evolution from concession agreement to service contract. Indeed, one can take the old concession form and develop for the host country a more favorable economic position than under a service contract.

One of the most popular labels being sought and applied these days in developing countries is that of "participation," whereby the host country gains an amount of the equity within the operating company. But again, participation can be a misleading concept. Professor Adelman has characterized participation as the great nonevent of the last year. Just what does participation give a developing country? It might not give actual participation in transportation; it might not give participation in marketing. It may simply give a host country a share of the income which the country might have had anyway under old profit-sharing arrangements.

In particular, it is important to observe that even if the primary goal of participation is host government representation on the board of directors, in many situations that representation may be virtually meaningless. As outside directors, government representatives often are unable to ask the right sort of questions within the board to put forward a rational government policy. What is needed in addition to participation in this sort of situation is the assistance of a technical team to assist the outside or government directors in their participation on the board of directors.

REMARKS BY ROBERT H. FRICK*

It is impossible in a reasonable space of time to cover the changes that have occurred in relationships between host countries and oil companies since the first concession agreements in the early 1900's. It is difficult to cover even the developments of the past three years. Oil producing countries have, of course, always wanted a greater share of the profits from producing operations within their borders and to exercise a greater control over such operations. With the use of hindsight it is possible to say that the degree to which these twin goals have been achieved over the past few years is not remarkable. I believe it is true, however, that five or even three years ago very few, if any, in the petroleum industry would have forecast the success which the producing countries have achieved.

* Associate General Counsel, Standard Oil Co. (Indiana).

The oil producing countries are no longer passive recipients of royalties or taxes representing a minor share of the proceeds of petroleum production. They have progressed through the stage of partnership with the oil companies to control of operations and a right to the lion's share of the profits. The oil companies have, on the other hand, long since lost the role of masters of the host country's natural resources. They are rapidly passing from equal partners with the host country to the role of minority shareholder, of crude oil purchaser, and in many cases of hired hand.

I will skip over developments of many aspects of concession agreements such as mandatory relinquishment, term, expenditure obligations, and arbitration clauses. Suffice it to say that over recent years these have become increasingly favorable to the oil producing countries. I will concentrate on the most dramatic developments of the last few years, the fiscal area and so-called "participation."

The early concessionaire paid a fixed number of gold shillings or the equivalent amount per ton or barrel of oil exported as a royalty. He was not subject to taxation. The host country revenue was therefore dependent upon the volume of production without relation to the value or price of the oil.

This situation changed in 1950 with the milestone agreement between the Arabian American Oil Company and Saudi Arabia which provided for an equal sharing of the profits. Under the Aramco formula the concessionaire became subject to a 50% income tax rate. Although he was still responsible for a royalty, the amount of the royalty could be subtracted from the tax payable so that the maximum amount paid through royalty and tax amounted to 50% of the net profits. These so-called fifty-fifty deals became the norm for the industry.

The conversion of most oil concessions to provide for taxation focused attention on the prices at which the oil was sold since those prices determined the gross revenue of the companies. Almost all major oil companies "posted" prices, that is, published the f.o.b. port of loading prices at which they were willing to sell and in fact did sell most of their crude. Posted prices were adjustable by the companies and were adjusted in line with market trends. In 1959 and 1960 the major companies reduced postings as a result of oil surpluses. The resultant impact on host country revenue led to the formation in 1960 of the Organization of Petroleum Exporting Countries (OPEC). Its membership has grown to eleven countries: the six Persian Gulf states of Iran, Kuwait, Saudi Arabia, Iraq, Abu Dhabi, and Qatar, the two Mediterranean countries of Libya and Algeria, and Venezuela, Nigeria, and Indonesia. The original purpose of OPEC was to prevent further erosion of posted prices. They have been completely successful in this and posted prices have become tax reference prices without real relation to the prices at which crude oil is sold.

Within the first five years of its life, OPEC countries succeeded in limiting and ultimately eliminating the reflection for tax purposes of discounts granted by oil companies from posted prices. They also suc-

ceeded in changing the tax treatment of royalties from a credit against tax to an expense item. Since then the rate of tax for OPEC countries has been increased from the traditional 50% level. In 1970 and 1971 a 55% rate became general for OPEC countries. Late in 1970 Venezuela raised its tax rate unilaterally to 60% retroactive to the beginning of the year.

The most dramatic success of the OPEC countries has been in raising the level of posted prices upon which taxes are based. In September, 1970, Libya, after considerable pressure on the oil companies, won their agreement to a 13% increase in postings. In February, 1971 the Persian Gulf OPEC members and thirteen oil companies agreed in the document known as the Tehran Agreement not only to an immediate increase in posted prices of approximately 21% but to further increases in June, 1971 and on the first of every year through 1975. In March, 1971 Libya and the companies adopted the Tehran formula but with posting increases 35% above prices agreed upon the preceding fall. Other OPEC countries reached similar agreements shortly thereafter with the companies doing business in their countries.

In January, 1972 posted prices were further increased by the so-called Geneva Agreement to reflect the devaluation of the dollar. Provision was made for periodic recalculation of exchange rates according to a formula. It was stipulated that the Geneva Agreement was in final settlement of all claims for changes in currency values "that have occurred or may hereafter occur" through 1975. However, it was found that the formula would not produce increases equivalent to the approximate 10% devaluation of the dollar in February, 1973. At OPEC's request talks are currently in progress in Cairo between OPEC and company representatives to consider modification of the Geneva formula.

The changes in taxation and posted price have naturally brought a tremendous increase in host country revenues. Iran alone enjoyed a 76.6% increase in so-called government take for fiscal 1972 over the previous year. Government take for OPEC countries not including Indonesia increased 55% in 1971 on an export increase of only 7%. By 1975 the programed tax increases will be about 125% over pre-Tehran Agreement levels.

In the 1950's oil companies and host countries shared profits 50-50 based on a 50% tax rate imposed on actual realizations or realistic posted prices and the crediting of royalties. Following the Tehran and other agreements, it can be estimated that the government's share of net profits ranged from 80 to 90% depending on production costs. In the first quarter of 1972, as reported in *Petroleum Intelligence Weekly*, Venezuela took 102% of the profits from the Shell concession.

Increasing tax revenues has been only one objective of OPEC countries. The other main objective has been participation in and ultimate control over crude oil producing and exporting operations. A number of concessions beginning with the AGIP concession in Iran in 1957 provided for equal participation, the host country or its oil company being entitled to one-half the oil and contributing one-half of the expenses

after commercial discovery. The oil companies, of course, took the exploration risk. The 1968 Algerian-Getty concession was the first to give the host country a majority position, a 51% interest, although voting control was equal. Algeria later decreed a 51% interest in French concessions to which the French finally agreed in 1971. Nevertheless, most Middle Eastern crude oil continued to be produced under concessions substantially wholly owned by oil companies.

In December, 1972 Saudi Arabia and Abu Dhabi signed a "Participation Agreement" with companies that had theretofore controlled a majority or all of the oil. The Participation Agreement provides for the purchase by host countries of an immediate 25% interest in the concessions for "updated net book value," certainly far below going-concern value. The agreements provided for the right to purchase further increments up to 51% by January 1, 1982.

It remains to be seen whether other OPEC countries will follow suit. Algeria, of course, already has a majority interest in its concessions. In October, 1972 the Italian state oil company, AGIP, agreed that Libya would have an immediate 50% in its concession and Libya has demanded that other concessionaires do likewise. In Iran the consortium of oil companies that produces the major portion of the country's oil reportedly agreed last month to surrender control of operations immediately in return for a long-term purchase contract. The companies will remain in the country as technical and service contractors under an agreement cancellable at the end of five years. Iraq settled its dispute with the Iraq Petroleum Company over the nationalized Kirkuk oil fields on a basis that appears to involve little or no compensation to IPC, but does give the company a crude oil supply.

Although there are a few outstanding exceptions, it is notable that the developments of the last few years have been accomplished in a very legal manner. Long-term contracts, arrived at on an arm's length basis between equally sophisticated parties, have been formally amended time after time to provide the host country with increasing revenue and control. Why have the oil companies been so reasonable and why have the consuming countries which must necessarily bear the cost of increased energy been so amenable?

A few projections cast some light on the situation. Petroleum (oil and gas) is at present the cheapest, most available and least polluting source of energy for the developed nations of the world which, because of their very development, are completely dependent on energy to sustain their economies. If we consider North America alone, it is forecast that total energy requirements will increase 92% between 1970 and 1985. The oil component of this demand will increase 81%. For the overseas free world, primarily Western Europe and Japan, energy requirements are predicted to increase 153% over the period. Of this, the oil component is estimated to increase 166%.

Where is this oil to come from? According to the State Department, 35% of the 1980 demand in the United States must be supplied from the Eastern Hemisphere. By 1985, the Chase Manhattan Bank believes

that fully half of the demand for the United States must be supplied from the Middle East and North Africa. Of the 500 billion barrels of known non-Communist oil reserves today, 300 billion, 60%, are in that region.

There have been many reasons for the achievements of the OPEC countries. Among them is their near monopoly of world oil supplies and the threat, often articulated, to act in unison in withholding these supplies if their demands are not met.

REMARKS BY J. SPEED CARROLL*

I would like to address myself to some of the issues of nationalism which I think are implicit in the developments we have seen not only in the mineral field, but also in industrial and economic fields. We seem to be entering into what might be called a third generation of relationships between developed countries and the developing world. As has been pointed out, the day in which the major commercial interests of the metropolitan powers constituted very much a law unto themselves has given way to a transitional period marked by hostility and uncertainties in relations between the representatives of the industrialized and the developing nations. Such times are characterized by mutual suspicion and even now hardly a day passes that we do not read about some threatened or actual takeovers, whether it be foreign insurance companies in India or copper mines in Chile.

The new nationalism of the developing countries is in some ways not very new at all. It has always been true that there have been very strong sentiments favoring national control of commerce, industry, and particularly over natural resources which make up the national patrimony. What has happened to bring about the new relationships has been not so much a shift in the attitudes of the policies of the mineral-rich producing areas as a shift in the balance of power. This of course results in part from mineral shortages, the well publicized energy crisis, etc., but one of the principal causes must surely be a vastly increased sophistication on the part of those who determine and administer the natural resources policies in the developing areas.

A whole generation of "technocrats" has recently come to maturity, and these are individuals with good academic backgrounds and some years of practical experience in dealing with international companies and their lawyers. These technocrats are capable, willing, and able to make use of the most modern techniques available. They also make extensive use of professional advice, just like their developed country counterparts, including that of foreigners when necessary. Alongside the very news items which announce nationalizations of this and that, we see frequent mention of the signing of contracts for the formation of international consortia for new mining projects, petrochemical plants, and the like. The press release figures are very large, not infrequently

* Of the New York Bar.

into the hundreds of millions of dollars. The Algerian "LNG" project with El Paso may be the most vivid recent example.

It seems something very strange is going on. If the economic nationalism on the part of the developing countries were the unmitigated evil that it has sometimes been accused of being, there should be fewer takers for the international development projects that are now being proposed. Some very fundamental change is apparently taking place in the contractual relationships between these two basic power interests. In many cases, parties working on developing country contracts are coming up with more and more imaginative and innovative solutions, which may be more burdensome on the foreign party but which are nevertheless acceptable. This is in contrast to the earlier stage of economic nationalism which is still present to some degree, particularly in the OPEC situation where host government demands are strictly in terms of larger slices of the pie. I think it is now much more a question of control and "participation" in a real sense, not merely in the sense of having a nominee on the board of directors, but in actually helping to shape the policies that are exploiting the national mineral resources.

These phenomena are present. Some people accept them; some do not. Within almost every company that I have dealt with, whether as counsel or adversary, there has been a considerable difference of opinion among the individual executives as to the appropriate manner of dealing with these nationalistic sentiments and the demands that are placed on them by the developing areas. Some people are open to change, quite sympathetic to the technocrat's point of view, and as willing as the technocrats themselves to search for innovative solutions to the problem of cooperative endeavor. Others are quite frankly hostile to this new nationalism and are nostalgic for the old "banana republic" days, but like it or not, we might as well get used to it, and I think that I am by no means alone in this view.

As Mr. Frick indicated, there are some major international oil companies—I know of at least one—which quite some time ago reached a firm policy decision to the effect that their future lay in being long-term purchasers of crude oil. They are not looking for equity-type participations any more, and I suspect from external evidence that policies along the same lines are more and more prevalent in the oil and mineral industries.

If we can free ourselves from the necessity of debating the largely dead issue of government control, we should be able to turn to more concrete problems, of which I know of two. The first problem area is that American tax laws generally favor the old concession-type agreement. I have seen one very large and potentially attractive transaction fall apart because of this specific problem. The American company was putting up the entire development cost, as is not at all atypical, and felt that the economics of the project required it to receive a 100% write-off on its development cost. The test for the availability of this deduction is whether the company has 100% of the so-called "operating mineral interest." One of the criteria for that is whether the U.S. com-

pany, the taxpayer, has sole control over development and operation. This of course flies right in the face of national pride, sovereignty, and is incompatible with what I believe to be the currently prevailing attitudes toward the control of natural resources. Although there are doubtless valid tax reasons, viewed in the abstract, for this type of provision, it does put U.S. companies at a disadvantage with respect to their competitors from other countries where tax administration is somewhat more flexible and less formalized.

The same type of problem resulting from a bias in favor of total control exists with respect to depletion allowances and other tax benefits. Attempts to deal with them through the creation of fancy tax devices, shadow corporations, cost companies, etc., are cumbersome and not really responsive to the basic requirements of the producing areas.

The second problem area is the extreme difficulty of finding an appropriate formula for the division of profits which can be applied to mineral exploration agreements: a formula for division which will provide a fair return to both the foreign entrepreneur, once the production stage is reached, and to the producing country, regardless of the particular facts and circumstances attendant to the mineral discovery that is made under the exploration agreement.

There are both significant advantages and disadvantages in specific cases, to each of the three currently used profit-sharing arrangements, that is to say the OPEC formula, the production-sharing arrangement, and the service contract approach, and no one of the three seems entirely suitable. Without pretending to have the answer to this very difficult question, I do think that the development of new profit-sharing formulas should be emphasized as one of the greatest challenges facing the practitioner in this field.

REMARKS BY CHARLES J. LIPTON*

Our first question is one of terminology. We have used a great many of these terms very loosely. We still talk in terms of "concession agreements." The meaning of that term has shifted. It now stands for a much broader concept than it did before. It is now an all-embracing term seemingly covering any agreement between a government and an operator for the exploration and production of mineral resources. I do not think it is an accurate enough term any longer. We lawyers have not been inventive; we have distinctions with differences within the broad term "concession." We now have operating or production agreement, development agreement, profit-sharing agreement, contract of work, management agreement, and service agreement. These terms mean different things; they bring different results. They represent different relationships between the government and the operator.

As Mr. Smith pointed out, they do not always mean what some think they mean. A deal where the government has 50% of the equity may

* Of the United Nations Secretariat.

not mean a fifty-fifty split of the actual profits. There is one government that I know of, for example, that insisted for domestic political reasons on having fifty percent of the equity, and so they got it. 100,000 shares were issued: 50,000 Class A owned by the government and 50,000 Class B owned by the foreign investor. A fifty-fifty split, absolutely, except for two things: the Class A shares owned by the government were non-voting and non-dividend participating. Nonetheless, the government was quite accurate in announcing for its domestic political purposes that it owned fifty percent of the equity.

The government-operator relationship has changed considerably since the end of World War II, and it is still changing. Mr. Smith referred to the LAMCO agreement as "an invitation to the dance." If you go back and examine that LAMCO agreement now, as it is in the process of changing, I think you might more accurately call it the "Last Tango in Monrovia." It is not going to be done that way again in Liberia.

What are the factors that have brought about this change? The first one is political nationalism which swept the colonial world and the emergence of new independent countries. The result, by and large, was the end of traditional colonialism, and with it, the end of the protection of the colonial companies operating in the colonies. With this change came the economic nationalism referred to by Mr. Carroll, the ending of the "banana republic" type of situation, with governments now wanting control over their own economies. Perhaps this was seen most dramatically in the 1962 UN General Assembly Resolution on Permanent Sovereignty Over Natural Resources. Economic nationalism is also seen in the insistence that producing companies be organized as domestic companies. This has various significant results under the U.S. income tax laws, because of such factors as the depletion allowance and the ability to consolidate for income tax purposes, making it more difficult to negotiate agreements.

There is, however, one major difference now and here I disagree with Mr. Smith. The trend from concession to service contract means not just changes in the sharing of revenue, but in government control over those basic decisions which affect the economy. Ghana has a phrase for it: they say they are engaged in a drive "to capture the commanding heights of the economy." I believe the question of control is where the difficult negotiating problems are now being encountered in hard rock mining agreements.

Mr. Frick has told us about the changes in the petroleum agreements. I think you will see that these changes have been paralleled, with a timelag of ten to fifteen years, in hard rock mining. Just as petroleum agreements went to a fifty-fifty split of profits, so hard rock agreements have gone to such a split and are now beyond that. Just as there were tax reference prices and posted prices in OPEC petroleum agreements, we find tax reference prices now in hard rock agreements, whether it is the London Metal Exchange for copper or otherwise. Just as royalties used to be credited against taxes in petroleum agreements and then

changed to a deduction in the computation of profits, hard rock agreements now more or less treat royalties as a deduction.

However, the question which I find is most difficult to negotiate is who makes the basic decisions. This involves not just maximizing the sales revenue, but other decisions as well. Because of high loan to equity leveraging, for example, governments have discovered that the interest charges being drained out of those revenues are very high. Some governments have received less than the amount of the interest paid to lenders in hard rock mining deals. Some governments have limited the loan to equity ratio.

Governments are becoming increasingly aware of conservation problems because of the current literature and discussions on that subject.

Just as the rate of operation became a significant factor in the petroleum industry, governments now recognize that this is a significant factor in hard rock mining operations as well. They have long been aware of the problems inherent in the determination of the cutoff grade, *i.e.*, extracting the highest value mineralization with the largest profits and leaving behind the low value.

Governments are increasingly concerned about the *real* benefits of a mineral project. They want assurances, or at least agreements to consider processing in the host country. They are insisting on preferences for local goods and services. They are concerned about the employment, promotion, and training provisions for their nationals. They are becoming more and more sophisticated and sensitive to the balance of payment effects of hard rock agreements. And of course no discussion is complete today without a reference to environmental protection.

Governments are insisting on control of the infrastructure: the railways, roads, ports, power, and water facilities. In pre-World War II agreements, these were built and controlled by the operator. Such was the case in the LAMCO agreement referred to earlier. Governments are now aware that there are other uses for such ports, railways, and roads for regional development and for lowering the unit cost of power and water to attract new industrial projects. They want control of the infrastructure now.

Another of the factors which has affected the changing relationship between the operator and the host government since World War II is improved technology. Deposits of comparatively low grade material are being mined at a profit which was totally uneconomic ten or fifteen years ago. This requires larger scale mining projects than before, which in turn require larger amounts of capital. That is why we now have \$400 million mining projects, unheard of before World War II.

Large scale financing has led to a new development, the role of the government as an indirect supplier of capital. Governments are now making capital contributions in the form of funds which have been made available through multinational organizations like the World Bank and bilateral sources such as the U.S. Agency for International Development, and the Swedish and Canadian government assistance agencies. Even the largest mining companies are not able to raise \$400 million them-

selves. Governments have raised part of the capital because they wanted to control the infrastructure which, until just recently, has represented the government's capital contribution to these projects. In fact, such loan capital can only be obtained if the government owns the infrastructure because it is only through governments that such funds can be borrowed from organizations such as the World Bank.

Concurrent with these very large scale projects has come a change in attitude towards security for loan capital. The pre-World War II mortgages on the plant and equipment are now almost completely gone. There are still agencies which insist on a mortgage as security for a loan, but that is not the real security for the loan. Increasingly, that is a take-or-pay contract or a long-term supply contract. Government and operator guarantees, rather than mortgages, are the real security. The financial risk is no longer on just the foreign entrepreneur. To a great degree, the financial risks are now being borne by the government as well. If the mining venture is a failure, the government will not be able to honor its commitment to make payments, so that the capital risks are being shared. This is entirely a post-World War II development.

The result has been that the equity of the operating company continues to represent a smaller and smaller percentage of the total capital involved in a large scale mining venture. For example, in Botswana, with more than \$200,000,000 in capital at this point in time invested in a large-scale copper-nickel mine, forty percent is probably being supplied by the government, directly or indirectly. The equity of the operating company is probably about fifteen percent.

Although the financing risks may be shared, the financial rewards, needless to say, are still greater on the equity contribution of the foreign investor than on the government's capital contribution. This is, of course, discounting any spread between the terms of the government's user charges and the cost of the money to the government by way of soft loans obtained under bilateral agreements.

All these developments result in part from the information explosion. In the pre-World War II period, it was very difficult to obtain information on the terms and conditions of concession agreements, as Mr. Smith pointed out. To some extent, it is still difficult; but as a result of petroleum agreements which have been highly publicized, the tremendous amount of literature being written in this field, the advent of university advisors like Mr. Smith's own Harvard Advisory Service, and the assistance of international agencies like the United Nations and others, governments are now recognizing their competitive situation.

There is increasing government sophistication, as Mr. Carroll pointed out, and government expertise. With this has come a new appreciation of the tax, accounting, and legal consequences of mineral agreements. This has also led to a considerable increase in the amount of government legislation and regulation. Concessions were traditionally enclaves, exceptions from generally applicable laws and regulations, because they were often in a legal void. There were frequently no

specific laws and regulations by which to govern them. The agreements therefore had to supply their own laws and regulations. One should also mention the impact of the advisors, individuals, and institutions, which have redressed the imbalance of experience and information existing between the operator and the government which so typified the earlier period.

I do not know whether we are in the third or second generation of agreements. If petroleum agreements are in their third generation, as suggested by Mr. Carroll, I believe that the present hard rock agreements are second generation and will in due course become third generation agreements. As a result of the increased competition between the companies themselves, some governments and their mining and manufacturing companies have wanted assurances of multiple sources of supply. They have been willing to pay a premium for these assurances in the competition between national companies. Perhaps this will accelerate the trend.

We have therefore seen a shift from concessions, as the title of our roundtable discussion suggests, to service contracts. Let me point out the concrete distinctions between these types of agreements. A concession agreement traditionally granted a property interest. It was therefore a long-term agreement; ninety-nine years was not untypical. It created enclaves and gave rise to exceptions to the laws of general application. Management "prerogatives" were left to the operating company. There was no government participation in the basic decisions, such as the rate of operation or marketing. The investor provided all of the capital. Typically, the investor was entitled to all of the profits, originally paying the government a fixed per-ton royalty. The first agreements in Liberia provided for five cents per ton for iron ore that was then selling at approximately ten dollars per ton. That was the total government revenue from the first iron ore agreement in Liberia.

The joint venture, which we now regard as a typical agreement, is a transitional stage. Here, there is some degree of state participation in the basic decisions. These agreements provide for increased government revenues. These are shorter term agreements because governments now understand the companies' own decisionmaking process, such as the discounted cash flow method of analyzing the attractiveness of different propositions. These agreements are therefore normally for a twenty to twenty-five year production term.

A service contract is based on a contractual relationship, not the grant of a property right. These are relatively short-term agreements, usually three to five years. They are subject to the laws of general application, unlike the concession enclave. In the more advanced agreements, like Venezuela's recent one involving iron ore, the government even provides the capital. This is really a hiring of the technology for a fixed price. The government has control over all basic decisions and obtains all of the profits.

The new type of mining agreements are being entered into by govern-

ments which have petroleum export revenues; for example, Iran's type of joint venture agreement, the contract of work of the Government of Indonesia, and Venezuela's service contract. I therefore think the terms and conditions of petroleum agreements are in due course going to be found in the hard rock mining agreements that are going to be negotiated in the next ten to fifteen years.

However, other governments are moving in that direction as the mining companies increasingly do not take the exploration risk. In the past the mining companies, the foreign operators, traditionally used to shoulder the exploration risk. They claimed they were entitled to more favorable terms and conditions because they had accepted it. Governments themselves are now finding mineral deposits through their own geological surveys, bilateral assistance programs, and through United Nations exploration programs. As a consequence, we should expect these governments to insist on the new forms of mining agreements as well.

The CHAIRMAN at that point invited comments and questions from the floor.

Q. Are people in the petroleum industry concerned with recent developments in host countries and what they may portend for the future? If so, have they communicated their concern to the Government of the United States?

Mr. FRICK responded that the petroleum industry is indeed concerned by the developments referred to as well as the future and has communicated its concern to the U.S. Government. It is almost amusing to note the change in the industry's attitude toward the importance of OPEC. When the first round of OPEC negotiations began, the companies refused to negotiate with OPEC as a body because they did not want to dignify the organization. As the Tehran negotiations approached, however, the companies insisted on negotiating with OPEC as a body to prevent the separate countries from "whipsawing."

The problem alluded to is a very serious one. The balance of economic power is changing in the world. The amount of revenue which is forecast to flow into the Middle East and North Africa is tremendous. The uses that will be made of that revenue and the power over crude oil is worrying many people. There is sentiment in Congress and among some economists for the formation of a counter-OPEC group in the OECD to protect consuming countries from this impact. No one is suggesting "gun boat" diplomacy however.

Historical antagonisms exist among the Middle East countries themselves which they have succeeded temporarily in submerging in the common interest. Will that success continue? If it does not, what will be the consequences? Will their power over the oil be used purely for economic gain or will it be used for political purposes? A meeting has been scheduled between a few of the OPEC countries to discuss how oil might be used as a weapon against Israel. A debate is now going on which was summarized in a recent edition of the *Wall Street Journal* between Morris Adleman of the Massachusetts Institute of

Technology, who advocates the hard line approach, and Jim Akins, the petroleum officer at the State Department. There is a great deal of interest in the future.

Q. Assuming the contracts being negotiated today are in the second generation, what advice could be given to companies or governments as to what type of provision might be included in the second generation contracts to bring them to the third generation in the future? In other words, does it make sense to include a periodic renegotiation clause in these contracts like that we have seen on a *de facto* basis in the oil industry?

Mr. LIPTON observed that the renegotiation of outmoded agreements is a fact of life. When an agreement is outmoded, it is going to be renegotiated. Hence, the inclusion or omission of a renegotiation clause will not change this fact of life. It probably does no harm, however, to include a consultation clause, generally a broadly worded provision. He pointed out that where you have government participation in the equity or, as in the more advanced agreements, actual government ownership of the equity, you have a more stable agreement by definition.

Q. Concerning the provisions in the contract between the Government of Mali and Texaco, under which (1) the government agrees not to nationalize, and (2) if it does nationalize, agrees to pay compensation in accordance with a certain formula, does one find this type of practice generally in other agreements or is this something unique?

Mr. LIPTON commented that this type of provision is being increasingly included in agreements because the companies, now alert to the problems of nationalization, are trying to include formulas for compensation in the agreements. The companies are, in a way, anticipating. This does not mean that companies are inviting nationalization, but they are certainly anticipating the problem. Whether the inclusion of a compensation formula in a contract is any more efficacious than the inclusion of a "no nationalization" clause is a question.

Q. Given the fact that the increasing instability in the contractual arrangements between the companies and host governments is a matter of very serious concern not only to the companies and international law scholars, but also to the economy and development of the entire nation and the developed world, has there been sufficient governmental involvement in these negotiations? Would it have been counterproductive for the consumer government to have become directly involved? What would be the desirable format for possible governmental participation in future negotiations? Have there been expressions from the producing companies' officials favoring direct negotiations between the consuming country's government and the government of the host country?

Mr. FRICK observed that it is important for the audience to realize that, in talking about the OPEC countries, he and the other speakers were discussing fairly sophisticated countries with educated people and proven reserves of petroleum. The question of what is a fair profit split in a situation where the host country is putting up capital and

perhaps contributing to technology has been the main focus of this discussion. There are many countries, however, where oil has not yet been found, where it is not known that it will be found, where the people are relatively uneducated from a technical standpoint, where the government has no capital to invest, and where the oil company will be taking a true exploration risk. You will find that the concession terms in some of those countries appear to be anachronistic in light of our discussion today. They are not, however. They are simply the kind of terms that the country is willing to offer in order to have an oil company see if there is any petroleum there. There are, therefore, many deals being made in the world today that might be called the traditional type. They do not involve the big oil and the big problems that we have been talking about. It is not true that everything is OPEC these days.

Mr. LIPTON felt that countries which do not have well-known mineral deposits and mineral development agreements have to pay a price for the first agreement. This is almost unavoidable. Hopefully, they can recoup this price in the second and subsequent agreements. With this comes increasing sophistication. Mr. LIPTON then commented on the desirability of the investing government's participation in negotiations. In situations where he has advised governments, host governments have resented such a suggestion. They do not want their relationship with the investor to be entangled with their diplomatic relationship with another country, particularly where oftentimes a considerable amount of development aid is involved. Host governments may look upon this as a method of blackmail. This is also recognized by the investor governments themselves because, by and large, they have shown considerable restraint in this regard.

Mr. CARROLL also noted that the role of investor governments is a very hot question at the present time. The view has been expressed that the issues in petroleum and energy policy are soon going to become so great that the decisions will be too important to be left to private entities such as Mobil, Gulf, Exxon, etc. If such is the case, governments of countries where oil is not a national industry will be forced to move into a direct assumption of control. Some petroleum economists, in particular, believe that this is going to happen sooner or later.

Q. In dealing with valuation of assets, will there be a conflict, in the absence of a specific contract provision, over the ownership of the land, or is there more of an expectation that industry will accept various countries' claims for patrimony, *i.e.*, ownership of the land? Is there also an expectation that more countries will insist that excess profits taxes be paid for past exploitation and the large amount of profits taken out of the country? Is there any pressure for renegotiation of contracts because of this tax factor?

Mr. SMITH did not think the question of land ownership bothered investors any longer. In Liberia, the traditional contracts have assumed that the ownership of the mineral is in the foreign investor. In Indonesia today, under work contracts, the basic theory is that the mineral is owned by the host country, and that theoretically, the investor does not own

the mineral until it is actually shipped from the country. These are very technical distinctions which have very little impact on the fiscal arrangements of the contract.

Mr. FRICK remarked that no one really cares who owns the crude oil in the ground. However, where ownership is in the host country, host countries have contended that no compensation need be paid for crude reserves upon nationalization. Compensation is paid only for physical facilities and not for the expectancy of the company for profitable operations in the future. The valuation of the physical facilities themselves can be a problem. Some recognition, he felt, should be given to going concern value but, in general, it has not been.

In response to comments from the floor on the inclusion of an antinationalization clause in agreements and on the financing of infrastructure, Mr. LIPTON stated that he had not meant to say that there is an increasing tendency for companies to ask for an antinationalization clause. It is different to ask and then receive, however. As is always the case in negotiation, the foreign investors inevitably ask for more than they are prepared to accept. Hence, in the usual script the investor asks for an antinationalization clause, which leads to a strong and sometimes emotional argument concerning sovereignty. After that, the conversation turns to the question whether a compensation clause should be included in case nationalization does in fact occur. One can argue that such a clause is nothing more than an invitation; it is provocative. But these agreements do frequently contain arbitration clauses. There is some increasing tendency to ask for a formula, whether it appears in the agreement, an arbitration clause, or legislation. This tendency depends on the bargaining power and track record of the government involved.

With regard to the risks the government bears in infrastructure, Mr. LIPTON observed that, to a large degree, there are successful shifts to operating companies, frequently guaranteed by the parent. That is significant because the operating company itself is normally no better able to bear the risks than the government. If the mine is not a success, the operating company is in no position to honor its guarantee; hence the guarantee of the parent. However, in bilateral arrangements, that guarantee is not usually found. A large amount of infrastructure is supplied by bilateral agencies. Admittedly, these are frequently on soft terms, but nonetheless, the loan is still an obligation of the government. Governments have therefore shouldered the risks in that respect.

Q. Regarding the subject of "imported inflation" where the oil producing countries were concerned that the capital they were receiving from the oil companies was beginning to cost more and more because of inflation in the country whose money was being received, is there any tendency for the more sophisticated developing countries involved in OPEC, such as Iran, to link the stability of supply and price to access in the markets of capitalized countries for their industrial products? Another major problem area in the Common Market is precisely

the various devices by which Iranian exports are being kept out of the Common Market. Is there any progress being made in that direction?

Mr. FRICK remarked that what was said about the cost of imports in the host country was very true. This is one of the reasons that the Tehran agreement and subsequent agreements have not been more strongly opposed in the consuming countries. They realize that there had been no real increase in the price of crude oil for more than ten years. The reduced postings of 1960 had not been restored. The 1970 Libyan increase was the first. Costs had been rising for both the operators and host countries. The consuming countries recognized a certain justice in the host countries' demands. There was no scarcity of crude oil when the prices were increased. It was an acquiescence on the part of the consumers and considerable intenseness on the part of the producers. The host countries are seeking to diversify their interests. Sheik Keramunde of Saudi Arabia made the intentions of his country clear in a recent visit to the United States. That country has every intention of investing, perhaps in refining and marketing facilities. We are a partner with Iran in a joint venture refinery and with India for a fertilizer plan. This is participation by the host countries in the nontraditional aspects of the oil industry.

Q. As to the effort in negotiating new patent clauses, is this going to reduce costs? Is the bargaining power of the Third World developing quickly enough to take care of this licensing situation?

Mr. LIPTON considered that the Third World has at least become aware of the result, in terms of revenue, of uncontrollable licensing. Increasingly, one discovers intercompany transaction clauses being included and sometimes, specific license clauses to provide some measure of control over the amount of such payments as a deduction against profits. It is obvious governments are concerned that these might be the equivalent of tax free dividends, not so heavily disguised.

WILLIAM B. MCCLURE, JR.
Reporter

PRACTICING TRANSNATIONAL LAW: THE NATURE OF THE BUSINESS, OPPORTUNITIES FOR ENTRY, AND THE RELEVANCE OF CONTEMPORARY LEGAL EDUCATION

The roundtable convened at 2:30 p.m., April 14, 1973, Mr. J. Gregory Lynch* presiding.

The CHAIRMAN opened the roundtable discussion by pointing out that the panel was jointly sponsored by the Society and the Association of Student International Law Societies (ASILS). The CHAIRMAN asked

* Harvard Law School.

the panelists to consider the practice of transnational law as it is presented in law firms, corporations, teaching, and international organizations. In considering these areas of practice the panelists were asked to comment on three variables: the nature of the practice, the opportunities for entry, and the relevance of contemporary legal education as preparation for the practice.

REMARKS BY JAMES NEVINS HYDE:*

Transnational law includes municipal law, public international law, and conflicts, including some attention to comparative law. For example, the international arbitration between the Arabian-American Oil Company and the Government of Saudi Arabia required George Sauser-Hall, the arbitrator, to weigh all of these variables. When you consider working in this field you should realize that you are concerned with politics, economics, and different bodies of law and also with great areas of uncertainty. I suppose that the current ITT case with \$92 millions of investment insurance is a good example of the uncertainty when a political and legal situation gets mixed up.

As to the equipment that one needs in working in this field, there is first a necessity for perception. Some of the modern theoretical writers on international relations, such as Robert Jervis at the Center of International Affairs at Harvard, have devoted their attention to perception. Perception involves how you look to me and how I look to you; and what you think I'm thinking, and what I think you're thinking. You have to put all those questions in the personal computer when you are in a negotiation situation.

One common perception problem involves the differences between the common law and the civil law. One of our Dutch colleagues was speaking to me just before this panel began about how it was somewhat disconcerting for a European to observe the techniques of the U.S. Supreme Court argument and questioning process applied in the International Moot Court proceeding this morning. The rules of the International Court of Justice provide (Article 57) that if a judge wants to ask counsel a question he asks the President either to ask the question or to give him permission to ask it. There aren't a great many questions asked. Another matter of perception: one young man this morning addressed the judges as "Your Honor." Nothing would irritate an English judge on the International Court of Justice more than being called "Your Honor." This is the way a justice of the peace is addressed in England.

In addition to what I would call cross-cultural knowledge, I think languages are extremely important. I can't imagine practicing before an international tribunal without proficiency in French and English and some Spanish as a minimum. Beyond that, I do not intend to comment on contemporary education. I do share the traditional wisdom in the

* Of the New York Bar.

United States that being a good municipal lawyer, being a good member of the bar of your own municipal jurisdiction, is an essential fundamental for a practitioner. Of course, that isn't necessarily true for a law teacher. I believe some of our most distinguished law teachers and presidents of this Society, such as Harold Laswell and Quincy Wright, were not members of the bar. One further word about law teaching. Full-time teaching, while it is likely to be the main concern of many brilliant lawyers, is likely to draw them at times into practice. The deans of law schools don't like that, because they like to see their law faculty on the campus everyday. But when the Suez Canal was closed originally, the first thing people involved in this country did was to see if they could pry Dick Baxter from Harvard to add his expertise to considering the problem of opening the canal. Lord McNair, who is a distinguished English academic international lawyer, and who was also involved in litigation, told me, in one or two cases in which we were both involved, that within 24 hours each side came to him and asked him to take their case.

Some corporations have shown a tendency to try to keep some lawyers, academic and practicing lawyers, on a minimum retainer, so that if something comes up they have a built-in conflict of interests, and opposing counsel will not be able to use their expertise. Parenthetically, I also think that the law teacher who argues the case of his client in a law journal or in his classes without disclosing that he's speaking more as an advocate than a teacher causes serious damage to the position of the law teacher as a sort of a philosopher-king.

I would like to explain briefly what the various areas of transnational practice are. In the United States, the Office of the Legal Adviser of the Department of State is the busiest public international law office. You have only to look at *International Legal Materials* and the *American Journal of International Law* to see that. Some of their major concerns today are the law of the sea, claims and the private sector, and terrorism. As to the large law firm, or the "Wall Street" law firm, as it used to be called, there is a considerable time-lag before the young lawyer can surface to handle transnational problems. In my case, I suppose I was four or five years in a Wall Street law firm before I was involved in matters of that sort.

As for corporate law departments, the experience varies with the corporation. In some corporations the corporate law department is very much secondary to outside counsel. In others, the corporate law department lawyers really are the top lawyers for the particular corporation. I have been involved in corporate law departments both as outside counsel to them and also as a member of one. But if one looks in the direction of the corporate law department then I think one's career is likely to be in the direction of going from legal adviser to top management.

Finally, I would like to say a word about the extent to which some people, like myself, have devoted some time to teaching even though being primarily a practitioner. I think that this teaching is useful and important. It's useful in keeping one in touch with the young so that the

practicing lawyer doesn't find himself talking to his own clients and associates and starting to think like his clients rather than having a fresh look at what the problem is. Also, when you get a very broad or new problem, if you have some academic contacts, perhaps through this Society or through teaching, it is very useful to learn something about what the academic legal profession is thinking. There was one American oil company which asked me for my opinion as to an offshore leasing arrangement in the area outside of Eritrea. The answer to that question depended upon whether Eritrea was part of Ethiopia or not, under the federal arrangement that then existed pursuant to a United Nations settlement. There were three members of this Society who helped me very much in formulating my opinion. Two of them, Professors John Spencer and Albert Garretson, had been legal advisors to the government of Ethiopia. Through this society I knew them well. We discussed the question at length and they helped me reach my decision.

REMARKS BY GEORGE A. ZAPHIRIOU*

May I also say that I feel somewhat of a fraud speaking about transnational practice. I describe myself as a small town practitioner since I am a member of the English Bar where we have only about 2,000 practitioners. I would like to present here two points of view which may prove useful. One is the problem of the English Bar at the present juncture and the other is the new important dimension of practice in the European Community.

Let me first deal with the situation at the English Bar. As you know, the English legal profession is split into solicitors and a few barristers, very few indeed. In this system the barrister who was interested in international practice was hampered and limited. It was difficult to compete with advocates all over the world because the barrister could not get instructions directly from his clients. To show the absurdity of the system, last year in a situation involving the arrest of a ship in Italy, I felt I was doing something very irregular when I had lunch on a very controversial matter with the top executives of the corporation involved. We met, in the strictest confidence, to decide where we should strike to effect the arrest. Incidentally, as in most international situations, it was very important for us to consider the political situation as well as legal considerations. Questions of whether an injunction would stand up and very intricate problems of procedure had to be determined. The English Bar has, however, relaxed its rules since last April and barristers can now take instructions directly from the client in international or foreign matters.

Before proceeding further, let us define transnational practice as opposed to domestic practice. I believe there are basically three primary functions in a transnational practice. Transnational negotiations is the first. The second function involves liaison with the local bars, and finally

* Barrister-at-law, Middle Temple.

the function of advising one's local clients on problems involving questions of foreign law. A corporation does not have the time or money to hire a Libyan lawyer; an Italian lawyer, a Greek lawyer, etc; nor will it be able to hire a public international law specialist, a contract specialist, and a shipping specialist. A transnational practitioner must know something about everything; otherwise an enormous conference would be required just to see if a ship can be arrested at short notice.

What about practice in the EEC? This presents many problems because to appear before the European Court of Justice at Luxembourg one must be a member of the Bar of a member state. That automatically disqualifies most American attorneys. American attorneys and consultants can appear, of course, before the Commission as agents or representatives of enterprises, as their executives can. The submissions to the Commission constitute the opening procedure, particularly in antitrust matters. This procedure is often followed by an appeal to the European Court of Justice.

Let us now consider the question of opportunities for entry into a transnational practice. Unavoidably, the nature of the business involves an elite class. It is an elite club not because of any formal snobbery but because it requires adequate financial backing and many years of experience to be able to go abroad and open branches and do the other things required of a transnational lawyer. These requirements make it very difficult for a young lawyer who is trying to break into the profession. It will normally require him to find his way into one of the big firms that have branches abroad. Transnational practice is also elitist in that it requires either many years of practice or a great deal of knowledge. Women, of course, can do very well in this kind of practice as it does not involve strenuous court work in crowded criminal courts. Minorities are welcomed because they will often be familiar with some special legal system and customs and therefore, in a transnational practice, they may prove more useful than the so-called majorities, whatever that may mean.

Now what do I mean when I speak of knowledge? I think that it is most important to have a feel for foreign languages rather than complete mastery. After all, you need a local man to do the actual drafting or appear in court.

I believe that in connection with a commercial practice the knowledge of the law of contract and the law of tort is important. I believe also that you must know the fundamental principles of foreign legal systems. It is rather presumptuous to talk about the common law of contract without taking into consideration the law of obligations of Roman law origin which is applied in the greatest part of the world, including Louisiana. It is also imperative to know something about comparative law, which used to be a luxury but has now become the tool of the transnational practitioner.

Now let us consider the last topic, the relevance of contemporary education. I think that it should be orientated towards practical experience, and cover both civil law and common law principles. I

also believe that currently too much attention is given to moots. It is much more important to teach students how to draft documents and agreements including arbitration, *force majeure*, and choice of law clauses.

REMARKS BY JOHN F. SCOTT*

I think I am the only current "international organization man" on this roundtable. Into my few minutes I will therefore attempt to squeeze a brief sketch of the lawyer in an international organization, more particularly the United Nations where all my practical experience has been.

I must admit that I am something of a fraud in being here at all. The part of the transnational law market of jobs which I represent is absolutely infinitesimal when compared to the large law firms or the multinational corporations. For example, the UN Office of Legal Affairs has only some 41 professional staff, recruited from among potential candidates in more than 132 countries. At the present time, 22 nationalities are represented in the office. On a rough basis, 59 percent of the legal staff are from Western Europe and other states—including 9 U.S. nationals—12 percent each from Africa and Latin America. Of the total of 41, 76 percent are on permanent contracts and the remainder on fixed-term contracts, varying from two to five years. About 10 percent of the professional staff are women.

Perhaps at least another 41 staff members outside the Office of Legal Affairs deal with legal and related questions, but this brings the not very grand total to 82, a figure which has been projected to rise to 104 by the year 1977. Taking all major international and intergovernmental organizations together, excluding the Common Market, I would hazard a guess that there are not more than 300 legal posts available and in filling most of them candidates from almost every country in the world have to be considered. I cannot therefore honestly say that I appear here as a recruiting officer with much to offer in the way of numerous openings for students who would like to work as lawyers in an international organization. However, such openings do arise from time to time, and we are presently looking for three or four young lawyers for the United Nations Office of Legal Affairs.

If I cannot offer many vacancies, I can say that the work, at least in my experience, is often challenging and exciting. The fields that have to be covered are very diverse and offer possibilities for all sorts of special legal expertise. To take the United Nations alone, in the Office of Legal Affairs one may be called upon to draft a legal opinion on a constitutional problem for the General Assembly or the Security Council, such as the question of membership when there is a change in the personality of a state or the voting majority required to cut the percentage of a state's contribution to the UN budget. One may have to work on a contract with a consortium for clearing the Suez Canal

* Senior Legal Officer, United Nations Secretariat.

or the harbor at Chittagong. One may have to draft regulations for international forces, agreements with states on privileges and immunities, a constitution and rules of procedure for a new international organization, or the basic instructions for the Administrator of a territory under United Nations control, such as West Irian in the interregnum between Dutch and Indonesian control. Much basic research has to be undertaken on questions of both public and private international law in the form of preparatory work for the International Law Commission and the United Nations Commission on International Trade Law. One may also have to work on the internal law of the Organization, such as the international administrative law which governs the UN staff as a whole. Written and oral pleadings may have to be prepared for an advisory opinion before the International Court of Justice or for a case before the UN Administrative Tribunal. One has to learn how to run the Secretariat of a major international conference or of a committee. This can involve rather surprising demands—once, for example, although a Protestant, I was asked and did write a sermon for a Cardinal Archbishop who was celebrating a special mass for a Codification Conference.

Outside the Office of Legal Affairs, a lawyer may work for the United Nations as an interregional adviser where, in the technical assistance field, he advises a particular government, at its request, in the negotiation of concessions and other agreements on natural resources. Lawyers are also employed in the United Nations to work on human rights, on refugee questions, on commodity agreements, and on peacekeeping missions. I could continue the list indefinitely, but my time will run out, and so will your patience. I must, however, say a few words about the nature of legal advice in an international organization, and about the qualifications, both ideal and real, which are required of the lawyer who is to work in such an organization.

Much of the legal advice given in the United Nations has special characteristics of its own. A legal opinion furnished to a UN organ is not intended to defend a particular client, or to prosecute a special cause. Its purpose is to support the principles of justice and to uphold the integrity of the Organization. Furthermore, very often it has to be derived from general principles as there is no precise precedent or case law. An opinion is perhaps more of a judgment than a brief. Not only must it state the relevant legal principles in the simplest and clearest possible fashion but it must also give practical advice on how a particular purpose may properly be achieved. A legal opinion may not always be followed, because of political considerations in what is an essentially political organization, but as long as it is manifestly honest it always commands respect.

What are the particular qualifications for a lawyer entering an international organization? As far as the ideal ones are concerned, I must bow to the acknowledged expert. The doyen of international lawyers in international organizations is, without a doubt, Wilfred Jenks, the present Director-General of the International Labour Organisation. With more than forty years experience in international organizations,

he must obviously know what it takes to measure up to the requirements of the job. In an article which he wrote for the *American Journal of International Law* in 1956,¹ he described the qualifications he felt a lawyer should have if he is to work for a foreign office or for an international organization. First there is the background—a general appreciation of universal history; a more detailed knowledge of diplomatic, legal, constitutional, military, and naval history; and a training in jurisprudence, political science, comparative government, economics, and the social sciences. After the background come the essentials—first, a full legal education, encompassing not only public international law, but also some acquaintance with comparative law and the main legal systems, such as French, German, Italian, Swiss, Roman, Dutch, Scandinavian, Spanish, Latin American, Russian, Islamic, Asian, African, and Chinese law. The next essential is a reasonable measure of linguistic proficiency, of which one gauge is the ability to draft legal texts in at least three of the official languages of the United Nations, which, as you know, are English, French, Russian, Spanish, and Chinese. The Charter of the United Nations, in speaking of recruiting the staff, refers to the highest standards of efficiency and competence. Mr. Jenks obviously has a very high estimate of the highest standards. When I measure myself against his requirements, I blush to admit that I was highly unqualified when I was recruited and am still unqualified today.

Joking aside, the main qualification for someone who wishes to work in the more general side of legal business in an international organization is a first-rate training in law with an emphasis on and specialization in public international law. Some practical experience in a law firm or government service may also help when a final selection is made. Ability to use at least two of the official languages of the United Nations is also increasingly being required. Much of one's training in the end turns out to be on-the-job-training because international organizations are still in their infancy and their legal problems are largely novel. Much of the public international law one has learned at school may at first appear to be irrelevant to the legal problems of international organizations. When I was at school some twenty years ago, the teaching of the law of international organizations, in particular, was rather rudimentary and in some places it may still be so. Many of those who teach it have had no practical experience in an international organization and thus tend to concentrate on theoretical questions which have little impact on the day-to-day legal work of the organization. However, in studying international law one becomes familiar with the sources and learns to think along the lines of the general principles of law, and this is really the heart of the matter. There is one other essential and that is a sense of dedication to the cause of the international community. One certainly does not serve in an international organization in the hope of making a fortune out of a civil service salary or a spectacular career in a place

¹ Jenks, *Craftsmanship in International Law*, 50 AJIL 32 (1956).

where anonymity is a rule of *jus cogens* and frequent promotions are only a gleam in the eye and rarely a reality. The satisfaction has to be found elsewhere in the nature of the work, in the challenges that it presents, and in the belief that one is, perhaps, doing a little bit for humanity.

REMARKS BY CHARLES STEVENS:*

I ought to point out first that my own practice is primarily corporate practice dealing with international business between Japan and the United States. Contract drafting is probably what I do most of, that and contract negotiations. In my field, many of the negotiations are not polite; they involve role playing on both sides and often extreme misunderstandings on both sides. I think, in addition to a good law background, the most important element in practice, especially in relations between Asia and the United States, is knowledge of an Asian language and a cultural familiarity with the countries where you specialize. To be able to communicate with your own client, and to be able to communicate *for* your client with the Japanese company across the table, knowledge of the language is absolutely essential. Also, I think my type of practice—that is practice with Asia—illustrates something that has happened in American law practice during the last ten years. The causes are primarily the revolution in transportation and something called the telex machine. Before 1960 it was impossible to get to Tokyo from New York in less than 26 hours. Now I go almost every month; it takes 16 hours. If you are representing Japanese clients in the United States it is necessary, I think, to meet the people in the Tokyo home office. Japanese abide greatly by this type of personal contact. It also helps to eliminate misunderstanding between a lawyer and his client. More and more lawyers, especially out of New York, Chicago, Los Angeles, San Francisco, and Washington are traveling around the world with their practices following them. If you have support services in various cities, there is usually no problem. You can travel, especially if your secretary and the people you work with out of the office from which you originate can handle the minor problems that come up. The telex machine has become extremely important. This is partly because of the time lag. Japan is almost exactly twelve hours opposite from the United States. My clients' legal departments can handle minor negotiations and telex questions to me or ask me to draft particular positions. By getting background by telex, I can do this on an overnight basis so that in effect their legal department works 24 hours a day. This has the added benefit that sometimes the Japanese clients are able to disguise from the opposing American side the fact that they are using a large New York law firm.

I think one of the most remarkable aspects of Japanese-American practice recently, and a reason for some of the bitterness in the negotiations,

* Of the New York Bar.

has been the expiration of the license agreements and joint venture contracts that were negotiated in the 1950's. Many of these had to be renegotiated. When they were originally negotiated, the Japanese company was small and Japan was a country that many American businessmen considered fun to travel to but relatively unimportant. Now, the Japanese company has become their major international competitor and has begun to threaten them in their own American market. By the same token, the Japanese have become aware of American hostility towards Japanese exports to the United States and, I think justly, they feel that many of our hostilities are directed against them because they work harder and are more efficient. Anyway, this atmosphere has begun to become a factor in actual negotiations and one of the things I find exhausting, but fascinating, is watching the acting involved, showing anger and friendship, crocodile tears. To me it is sort of a continuing theater.

In conjunction with my own practice, I would like to stress the importance of the Far East and what that means to all the law students here. Certainly, Japan's trade with the United States is approaching the size of that of the entire European community. If you tour the Hong Kong and Singapore financial centers, and places like Indonesia and other areas in Southeast Asia with huge resources, I think you would agree with Chairman Mao that the East is overtaking the West. So if any of you are looking into the field, I would think it best not to look for opportunities in European trade as it is very heavily traveled now with people who are already in line. But get yourself an East Asian language, since there are now only five or six people who can speak East Asian languages and who also are members of the American bar.

As to opportunities for entry, these are improving greatly. Before I got out of law school, I interviewed several New York law firms and I went to a firm that was the biggest in town, just out of curiosity. I told them I had a Fulbright grant to study in Japan and they said, "Well, that's very interesting. When you get finished fooling around we'd like to have you." Then I was treated to a lecture on how any New York lawyer can travel anywhere in the world, and practice New York law without worrying about sensitivities. I thanked them very much for the interview with their firm and departed. Now that's changing. New York law firms are becoming more perceptive about the need for language and for understanding the local culture and the need to use good local counsel. Three years ago my firm was about the only firm actively recruiting people who knew Japanese or Chinese. Now, we have been joined by those who have actively recruited with us for those with European languages. New York firms are waking up to the importance of cultural study, combined with good law.

As to the relevance of legal education, I found that most of the courses on transnational law or international business law in law school proved relatively worthless in practice. I found to my surprise the most useful courses to me were the practical courses that I got in law school. In particular, the international aspects of U.S. income taxation, the antitrust course, and a course in the Uniform Commercial

Code. The reason is not an intellectual fascination but that in practice you never get a chance to learn these things. If you don't force yourself to learn them in law school, you may never have another chance.

Finally, I think that it is important to consider the lawyer's place in the foreign society. The Japanese have a word for lawyer, *Sambyakudaigen*, which means "shyster" or "person who speaks with 300 tongues." I think that summarizes what is thought of lawyers throughout Asia. One of the biggest problems of practicing in Asia is educating your own client about how to use you. The tendency is, for instance, to bring you a sentence out of a hundred page agreement and ask you what the sentence means but not to invite you into negotiations. To bring a lawyer into negotiations is a hostile act. The social role of the lawyer is extremely low both in Japan and Indonesia. In Indonesia they don't even call themselves lawyers; they refer to themselves as consultants. In China traditionally the lawyers also have a low social role and that is only untrue in the town of Singapore where there is a strong English tradition. The lawyer in Asia might not be thought of by Asians as having a proper role, but this is changing. The Japanese are now becoming more and more aware of the benefits of using American lawyers, at least when dealing with America.

REMARKS BY B. KO-YUNG TUNG:

I come here with two hats on, one of Edward Martin, who was unable to be here, and the other is my own, which is that of one straight out of law school and practicing only for a few months.

Mr. Martin asked me to impress upon you the fact that it is very difficult to practice transnational law without fully understanding the culture and the laws of the foreign nation with which you are dealing. It is difficult to sit in New York and keep current with the law and thinking and certain forecasting that you have to do in the practice of law.

Now I will put on my own hat. First I would qualify my remarks by saying that my observations are of course limited to a couple of months of practice. Perhaps since I am just over the line from law school, I can evaluate law school from a more objective and yet close perspective. I agree with what Mr. Stevens has said about the utility of concrete practical law courses, but I think the so-called legal-cultural courses are also very important. Trying to understand a foreign culture, their attitude towards lawyers, and the role which law plays in the society as a whole is imperative. In my very short experience, transnational business courses have been at most marginally useful. Knowledge of the social context in which the laws are to be applied is more important. To be able to appreciate this added dimension, one must have what is called extra-legal skills. This, of course, assumes the basic necessity of legal competence and experience. My conception of my own role is first to know the U.S. law and second to be an "orientator" for my client to the laws and culture of the jurisdiction in which he is doing business.

To do these things, all of the speakers have indicated that languages are important, but I think the most important thing is a method of communication through sensitivity. One who does not know a word of Japanese may be very effective if he is sensitive to Japanese thinking and business patterns. Language, although useful, is not indispensable, since communication takes many forms.

REMARKS BY M. SEAN MCMILLAN*

Like Mr. Stevens, I am engaged in the practice of international corporate law. I would like to outline briefly my view of the role of the practising U.S. attorney whose clients are involved in international transactions—the “transnational lawyer.” These lawyers should be competent to give advice on the laws of more than one country and must be able to evaluate the relative legal advantages of particular business decisions as they are affected by the laws of one country or another. Typically, the transnational lawyer will represent a business enterprise in its operations abroad, or he may represent a foreign enterprise in connection with its operations in the United States. In the latter capacity, his considerations are generally no different than those of his fellow “domestic” corporate lawyer. Although the decisions of the foreign business enterprise may be affected by the laws of its domicile, the legal considerations for the U.S. attorney are usually those of any transaction occurring domestically.

In representing multinational business enterprises in their operations abroad, the transnational lawyer is very often consulted in negotiations of commercial arrangements such as long and short-term sales agreements, acquisitions, and the like. For each country involved in the transaction, he must have a general working knowledge of the pertinent commercial laws of those countries, such as its companies law, tax laws, laws relating to real and personal property, etc. In acquisitions, he must consider not only the antitrust laws of the United States, but also the antitrust laws of other countries, such as those found in the European Economic Community. His advice to his clients on restrictive trade practices may differ depending upon the impact in the United States and the impact in various other countries.

Typically, the U.S. attorney representing multinational business enterprise will be involved in structuring foreign business operations. Perhaps the most important single consideration in deciding upon the foreign business structure is the effect of taxes. Multinational business tax planning includes evaluating the impact of U.S. taxation of foreign-source income and the impact of foreign taxes on the income of foreign branch operations. The tax considerations are very often determinative of the overall structure of the multinational business organization. Other areas typically requiring a transnational lawyer

* Of the California Bar.

include problems in maritime law, currency restrictions, patents, and licensing of technical know-how.

The perception of the transnational lawyer in representing multinational business enterprise is very important. Many U.S. attorneys go abroad to negotiate on behalf of their clients with drafts of agreements which include the verbose "boilerplate" which is so common in commercial agreements in the United States. They never realize that in many areas of the world such extensive contracts are not really appropriate. In fact, in many countries, given the nature of the conduct of business, the parties might be much better off without such extensive boilerplate, leaving to the future the resolution of any problems which crop up in subsequent negotiations. Most U.S. attorneys, however, never accept that view.

I suppose I am merely stating the obvious, but the transnational lawyer should feel free to use, and in some situations must use, a good corresponding attorney who will, of course, handle all the local legal work that needs to be done but who will also be able to give good, appropriate, and timely advice on local laws and customs. For example, I was working recently on an acquisition of a Canadian company for one of our clients. A new tax law had just been enacted there and, as in the United States, the position of the seller would be influenced by tax considerations. Although the laws were in English and to some extent similar to U.S. tax law, I, as any other "foreign" lawyer, was not competent to fully evaluate the new law. After a short search, we were able to find a good local attorney who, as it happened, had helped draft the original tax act. His advice was obviously of great help and assistance in planning our acquisition. Although I negotiated and prepared the acquisition agreement, the attorney we engaged in Canada reviewed it and suggested changes, which were adopted.

The function of attorneys varies greatly from one country to another. I think it is fair to say that the multinational business enterprise views business planning and legal guidance as closely intertwined. The strict separation of functions performed by foreign counsel may make it impossible for the businessman to receive from foreign counsel the all-embracing legal service which is customary in the United States.

We have already discussed the role of an attorney in Japan. In Europe, attorneys are often regarded solely as scriveners, or those who will reduce to writing agreements reached by the principals. European lawyers are not generally as well versed as their American counterparts in dealing with the overall legal or business considerations nor with the business aspects related to legal problems. In France, there are *avocats*, *avoués*, and *notaires*, each of whom performs specialized legal functions. There are also laymen who give specialized advice—the *agents d'affaires*; they include the *conseil fiscal*, who gives tax advice, and the *conseil juridique*, who gives general legal advice.

In Mexico, as well as in other parts of Latin America, lawyers are used primarily as problem solvers and not in a preventive capacity or

as planners. Until recently, Mexican lawyers were retained by plaintiffs or defendants when all other avenues for the solution of a conflict were closed. In certain areas of the world, such as Bermuda, the Bahamas, or the Cayman Islands—the so-called tax havens—there are very sophisticated local practitioners.

The competent and useful transnational lawyer should function much like an overseer or a conductor in coordinating the activities of local attorneys. He should check and weigh information provided by local lawyers and act as intermediary between the multinational business and the local lawyers. As a practical matter, the client expects the transnational lawyer to assume the responsibility for the accuracy and thoroughness of the local lawyers. He must be able to interpret and evaluate disparate customs, traditions, and experience for his clients' international operations.

Another area which U.S. attorneys often neglect involves the use of other professionals and consultants. Other professional persons, such as accountants, are often much more familiar with specific details, such as those involved in specific local tax laws. They can and should provide the transnational lawyer with very helpful and able assistance.

WILLIAM M. POOLE
Reporter

JOINT LUNCHEON WITH THE INTERNATIONAL LAW SECTION OF THE AMERICAN BAR ASSOCIATION

The luncheon was presided over by Mr. Benjamin Busch, Chairman of the Section on International Law of the American Bar Association. The CHAIRMAN observed that the aim of this series of jointly sponsored luncheons was to join the halls of academia and the practitioners, since only through the study and wise application of international law would there be hope for peace and rule under law. In introducing the first speaker, he remarked that the Vietnam war must command our very serious and devoted attention. It has been the longest and most costly war in our history and has left us uncertain whether it began legally, whether it has ended honorably, or whether it will go on forever.

THE JUSTNESS OF THE PEACE

REMARKS BY RICHARD A. FALK*

Let me start by relating two points I think most Americans are in agreement about at this time: the first is a widely shared sense of relief that includes both critics and supporters of our earlier policy that the

* Princeton University Center for International Studies.

direct American combat role in Vietnam at least is apparently over, and that American forces, both prisoners of war and ground troops, have been repatriated and withdrawn. It must be understood that this point of initial agreement is not so substantial if considered more closely.

Critics of American policy are concerned by the continuing and accelerated U.S. combat role in Cambodia. They are also concerned by reports of the transfer of American military and paramilitary roles in South Vietnam to American civilian personnel who will number close to 10,000. They are concerned about the continuation of an apparent American advisory and financial role in support of South Vietnam's cruel system of imprisonment that affects several hundred thousand people and by the persistence of the so-called Phoenix program, which engages in a large-scale civilian assassination operation. Critics, despite their sense of relief, are most of all anxious about the provisional character associated by American leaders with the ending of the combat role. The President has several times uttered warnings and threats of an American readiness to reintervene in Vietnam once again by means of a unilateral national decision made, perhaps, only in the White House. Therefore, because of the tenuous nature of our withdrawal, the effort of Congressman Jonathan Bingham to condition any sort of direct American reintervention in the Vietnam war on prior congressional authorization is extremely important in order to insure that the sense of relief that all of us presently feel endures. It is accurate to observe that this is the first spring in almost a decade that American soldiers are neither dying nor killing in Vietnam, and for this, as long as it lasts, let us be grateful. So that it may last longer, let us not forget that it is still necessary to act to maintain the present greatly diminished American involvement in the Indochina War.

The second point of general consensus, it seems to me, is the recognition that the relevant facts of political and military control in South Vietnam, the motivation of the various actors in the continuing struggle that is going on there, and the degree to which these actors support the various features of the Paris agreements is an extremely complicated matter. No one can have any very positive sense about it at this time. In my judgment there are no easy, one-sided answers, for instance, to the question of allocating responsibility for the violation of various central provisions of the Paris agreements.

The news reporting has been particularly inadequate because both sides have tried to keep media personnel from gaining access to areas in the field where combat is taking place. The North Vietnamese and Provisional Revolutionary Government people in the south were for a long time prevented from even talking to newspaper people.

As a further preliminary point, may I state that I see no useful function in further debating the various questions as to how the Paris agreements came about, whether they could have been negotiated years earlier, whether the Christmas bombing altered the terms in favor of the position of the United States and Saigon, and more generally, all those large questions bearing on the legality of American involvement over the years,

although obviously one's attitude towards these issues influences one's approach to the present situation.

I think it is important to focus at the present time on the condition that now exists in Indochina, particularly in Vietnam. I would like to emphasize two features of this situation which I regard as most unfortunate. Despite all my disagreements with President Nixon's policies for ending the war over the past several years, I believe he obtained for himself in the Paris agreements of 1973 a great opportunity to promote prospects for peace in Vietnam and reconciliation at home. He has in fact chosen not to take advantage of this opportunity. Rather he has chosen to maintain the continuity of American policy by once again associating our national interest with the survival of the Thieu regime in South Vietnam, and he has so identified peace with honor exclusively with those who have supported the war that those who have opposed the war are deemed dishonorable.

First with respect to Vietnam itself, it seems to me that the U.S. Government could have and should have chosen to support even-handedly the concepts embodied in the Paris agreements, rather than to continue its posture of unqualified commitment to the Thieu Administration. Our government could have shown an interest in the enforcement of the provisions in the Paris agreements against all parties. In particular those provisions anticipating negotiations on the release of political prisoners and the establishment of the conditions necessary for the dynamics of political self-determination to take place in South Vietnam should have been strongly backed by Washington. Most explicitly, the United States could have called for serious implementation of Article XI, especially Saigon's obligation therein assumed to allow freedom of movement for refugees and freedom of assembly for all Vietnamese. In such a context the dynamics of political opposition could take place more naturally; by securing compliance with the Paris agreements opponents of the Saigon regime would not be forced into a choice between acquiescence and the battlefield.

These political provisions were important because they sought to create a middle ground for anti-Saigon forces between the battlefield and acquiescence in which the unresolved struggle over the political control of South Vietnam could take place. As even Henry Kissinger acknowledged at his January 24 press conference, the questions of governmental legitimacy in South Vietnam have not yet been settled. There is no pretension that the Vietnam War is over in the sense that its main issue, that is, who is to control the political destinies of South Vietnam, has been settled by the Paris agreements. The only question is whether it might yet be possible to shift the conflict from the battlefield to the political process. That shift is the main open issue, and therefore when we charge the other side with violation of the infiltration provisions and with recourse to battlefield strategies, it has to be understood in relation to the refusal by President Nixon or Thieu's regime to do anything whatsoever to show that these political provisions in the agreements are taken seriously.

In this sense, the San Clemente communique of Nixon and Thieu issued on April 3 is an extremely significant document. It is President Nixon's formal acknowledgement of approval for the way in which Nguyen Van Thieu was carrying out the Paris agreements and governing South Vietnam. In this formal document our President associated himself fully with President Thieu; I quote from the communique: "President Thieu expressed his earnest desire for reconciliation among the South Vietnamese parties." To allow that kind of statement to be made by Thieu when he is keeping in jail between 40,000 and 250,000 noncommunist political opponents who are identified with moderation and neutralism—student leaders, Buddhist leaders, and so on—is utter hypocrisy. Then to say you are in favor of a policy of accommodation, and to associate the United States with that kind of interpretation of what reconciliation means, seems to me to undermine any prospect for upholding the basic bargain embodied in the Paris agreements. It indicates to me, and I think to the Vietnamese as well, that the American purpose in adhering to the Paris agreements was to reach a narrow tradeoff in which we would secure the return of our prisoners in exchange for the withdrawal of our ground troops, but would not alter our basic posture of alignment with the Saigon regime. Nixon has not acted as if it is in America's interest to implement the agreement as a whole, but only to use it as a tool to promote the survival of the Thieu government. The problem with our policies for years has been that we have associated our interests and our victory with the success of this regime.

I am suggesting that there was a viable alternative to pro-Saigon loyalty open to President Nixon after the Paris agreements and the agreement provided the framework in which to implement this alternative. It is true the civil war might have resumed in any event, whatever Mr. Nixon had done. But what I am suggesting is that the failure to seek an even-handed implementation of the Paris agreements and the failure to show any interest in the flagrant, persistent, and systematic violations of that agreement by the Saigon Administration, doomed that part of the agreement which looked toward the establishment of, or the move toward, peace and a political solution of the conflict. This made it impossible for the opponents of the Saigon Administration to place any reliance upon the dynamics of political self-determination. The reason that Thieu was the only opponent among the four negotiating parties of the Paris agreements (everybody else was happy about it, but Thieu had to be dragged into it) was that in truth he probably can't survive the dynamics of political self-determination. His opponents did have confidence in it, I am convinced, because the balance of political forces in South Vietnam is in their favor.

We become aware of a real issue for American policymakers: one has to be either prepared to sacrifice Thieu, or prepared indefinitely for reintervention in South Vietnam, and in Vietnam generally. There is no middle way. We have stuck to the same path that has been pursued throughout this decade. We have not disassociated ourselves from the old objectives, and we are as committed as we ever were to the frustration

of self-determination for South Vietnam and to the indefinite maintenance in control of a Thieu-like regime. The United States does not insist on Thieu as the head of the government, but only the persistence of a Thieu-like regime. In my view that is the central failure of American statesmanship with respect to the agreement negotiated in Paris.

My second point, and a much briefer one, concerns the domestic implementation of the agreement; that is, failure by the Administration and by President Nixon to use the moment of the cease-fire and the repatriation of the prisoners and withdrawal of American forces as a moment for national reconciliation here at home. Instead he has used the occasion to deepen, if anything, the polarization that has been built up over the years around the issue of the war. I refer in particular to his speech before the South Carolina legislature, which is probably his fullest statement of what peace with honor means. In that speech he clearly identified the pro-war pilot POW's as exemplifying peace with honor and made no allowance for the fact that many conscientious Americans disagreed with this policy. Nixon would not have had to renounce his own support for the war policies. But he had a great opportunity as a statesman to say that there were many points of view in America about the war, that people reasonably disagree, and that various kinds of sacrifices were made by people who disagreed with the war policies. It is a sacrifice to go to jail; you do risk your career in going to Canada. It may not be the same thing as going into the armed forces, but in many ways I think it is a harder decision for the individual who makes it.

What I am suggesting is that Nixon had a great opportunity to achieve reconciliation by acknowledging the realities of the anti-war sentiment that had built up in the country and in Congress over the years. In the 1939-1971 period, 60 percent of Americans polled about the war thought it immoral for the United States to be involved in Indochina. 60 percent is a large segment of the society. It was not a deviant position to have acted in opposition to the war. Therefore, just as the returning POW's have been a symbolic issue for the Administration, so is the hardening of the position on amnesty a symbolic position for those of us who have opposed the war. Rather than moving toward reconciliation, the President has actually adopted a more rigid position on amnesty since the cease-fire. He has made people feel that in order to establish their own honor in relation to the society, they have to repudiate those who opposed the war. This kind of one-sided view of the war encourages a continuation of the destructive polarization in American society that was stimulated by our involvement.

In conclusion, I would say that as a consequence we have neither peace nor justice nor honor. We are still entangled inappropriately and ineffectually in the destinies of South Vietnam. And we still have a country that is deeply divided. A fair portion of America regards the government in Washington as lacking in sensitivity toward the claims of its citizens to have positions based on their conception of honor as

associated with scruples about supporting America's involvement in the war.

The future of America's role in Vietnam remains in doubt. As of now we can only lament our continuing contribution to the torment of the Indochinese people. In particular, the U.S. Government has not demonstrated a commitment to the Paris agreements, and has rather expressed mainly its fidelity, no matter what, to the Saigon Administration despite its blatant repudiation of central provisions of the settlement bargain. Furthermore, the President has deprived Americans of an occasion for rejoicing about the cease-fire by his insistence in associating honor with pro-war Americans and dishonor with anti-war Americans.

REMARKS BY EUGENE V. ROSTOW*

The topic assigned to us today is "The Justness of the Peace." I take it from what Mr. Falk has said that he thinks the peace is unjust because it involves support for the Thieu regime, which he regards as cruel and unjust. He discussed various shortcomings of that regime from the point of view of democratic theory without comparing it in these respects to its rival in North Vietnam.

I don't think that really is the issue which the Society asked us to discuss. At least it is not the issue that I have perceived, or can perceive. I don't think we were asked to consider which Vietnamese government is more democratic. And I do not understand how that can be an issue of international law. But I am not going to address the problem of "The Justness of the Peace" that was made in Paris for Vietnam from the point of view of my personal criteria about how South Vietnam and North Vietnam should be organized. What I shall try to do is to address the question in the perspective of the standards of justice embodied in international law. The Paris agreements were international agreements terminating an international conflict. The question I should like to pose is whether that peace arrangement meets the standards of justice of international law as embodied in the UN Charter and its development.

When we talk about the peace in Indochina, we are at a great disadvantage, of course, because we do not know how these various arrangements are going to work out. As Mr. Falk says, there are arguments, or at least there are conflicting statements, about who is violating the agreement, who is preventing the cease-fire. But there is no argument whatever about the fact that one of the most critical features of the settlement, namely, the evacuation of North Vietnamese forces from Laos and Cambodia, has not taken place although American forces have been withdrawn.

I can see no alternative today, therefore, to considering "the paper peace" as if it were, or would soon become, a reality in North and South Vietnam, Laos, and Cambodia. We should therefore examine the docu-

* Yale University Law School.

ments themselves as best we can understand them, the cease-fire settlement of January, as backed by the declaration of the states assembled in Paris early in March, the Act of Paris.

Save for a little blurring around the edges, the understanding reflected in these documents is the same as the armistice arrangements in Korea. It is the same as the Korean settlement because both episodes are dominated by exactly the same overriding considerations of international law, and of the international politics which lie behind international law. The agreements signed in Paris, like those which ended the war in Korea, rest on the principle that South Vietnam, like South Korea, is a separate state with the right to defend itself against attack from outside, whether that attack is conducted by organized armies, an invasion of guerrillas, or international assistance to internal insurrection; that the United States and other nations have the right recognized as just under international law to assist South Vietnam in that process of defense; and, correlatively, that North Vietnam should not interfere in the processes of self-determination within South Vietnam through force, through the infiltration of guerrillas, or through military assistance to insurrectionary forces within South Vietnam.

In other words, the peace of Paris rests on the premise that there are indeed two separate states in Vietnam (to borrow Chancellor Brandt's phrase about the situation in Germany, two states within a single nation, if you will) that those states can unite if they wish peacefully by political agreement, but that they cannot use force against each other.

Secondly, it rests on the related principle that every state is responsible for the use of force from its territory, from which it follows that North Vietnam cannot and must not use Laos and Cambodia as an infiltration route to attack South Vietnam. In this regard, the Paris settlement expressly reaffirms the 1962 Geneva agreements about Laos and Cambodia.

Let me be extremely clear. The agreements of Paris fully accept the official position of the United States throughout this long, bitter, and tragic affair. Since Truman's time, and most emphatically after the Geneva Conference, the United States has taken the view that two states emerged in Vietnam within the meaning of international law, two states exercising authority within their respective jurisdictions, and protected against external attack by the principles of the Charter, endowed, that is, with an inherent right of self-defense and a right to ask other states to assist them in the exercise of that right.

This was the premise of the SEATO Treaty, through which we sought to deter attack by announcing our state interest in the territorial integrity and political independence of South Vietnam. In this respect, both our posture and that of South Vietnam was entirely "just" according to the standards of international law. Article 51 of the Charter fully accepts both South Vietnam's inherent right to defend itself under the circumstances of recent history and the right of the United States and other nations to help South Vietnam if they wished to do so.

This position has been the premise of American policy as a matter of constitutional as well as international law. The United States has carried on the conflict both under the treaty itself, as President Truman did in Korea, and through congressional actions backing the President's interpretation and application of the treaty.

To this position three answers have been offered, notably by Mr. Falk. These answers are not always consistent, but they do constitute three fundamentally distinct legal theories. In the first place, it is contended, the war in Indochina is not an international war, but a civil war; North Vietnam and South Vietnam are part of a single state and not two separate states. This is an argument that the Soviet Union made against the action which we took in Korea in defending South Korea's right to protect itself against attack from North Korea. It is a fact confirmed by the experience of twenty long years that South Vietnam and North Vietnam are separate states within the meaning of international law. They function as separate states; they have been recognized by many nations; and they have exercised authority and participated in world affairs as separate states.

The second argument against the official United States position, and one which I believe is also contradicted (at least on paper) in the agreements reached in Paris, is that the failure to hold a referendum on reunification in 1956 justified North Vietnam's attack on South Vietnam. This argument, like the first, is without substance. There was no promise in the arrangements that emerged in Geneva in 1954 that there would be such a referendum. The statement on the subject was embodied in something called a "Declaration" issued at the end of the conference by the two co-chairmen, and supported, even nominally, by only four of the nine participants in the conference. In any event, even if there had been such an international promise, under the usages that have developed around Article 51 of the Charter the breach of a political promise does not justify the wronged party in using force. This was precisely the position taken at the time of Suez, where the British and the French claimed that the Egyptians had breached treaty agreements with them regarding the Canal, and that the breach of those treaty arrangements justified their intervention by force. The Security Council overruled the French and British position at Suez just as the Vietnam agreements of January and March reject the theory that North Vietnam was privileged to attack South Vietnam because no referendum was held. I think it is generally agreed both in usage and in the literature of international law that a breach of an agreement of that sort is not the kind of act which could be considered as justifying the use of force under Article 51.

The third argument advanced to attack the position of the United States in this regard is that Hanoi was justified in providing assistance to the insurgents in a civil war *within* South Vietnam. International assistance to revolutionaries, it is claimed, is permissible in order to uphold the right of self-determination of peoples.

It used to be considered orthodox black-letter doctrine that a state in a condition of civil war had a right to ask for help from friendly states, but that no state had a right under international law to assist the insurrectionaries. Now, we are told, international law has changed in this regard.

The orthodox position was taken by the United Nations as a matter of course in the late forties with respect to Greece. The insurrection within Greece was being helped from Yugoslavia, Albania, and Bulgaria. UN policy then was that the United States and Great Britain had a right to assist Greece, but that no other state had a right to assist the revolutionaries.

This was the basis for policy with regard to the Congo, when the Katanga secession occurred. It was the position taken by the international community in the Nigerian crisis during the Biafran secession. It was accepted as self-evident when the Soviet Union invaded Hungary in 1956 and Czechoslovakia in 1968. The objection on those occasions was not that the Soviet Union could not legally assist the Government of Hungary or the Government of Czechoslovakia in putting down an insurrection at their request, but that there were no such governments and therefore no such requests.

The claim that international law should recognize a right of states to assist revolutionary movements within another state, which has been asserted recently in the literature about Vietnam, is entirely without foundation either in state practice or in the nature of the UN Charter as a covenant among states. If accepted, it would be an extremely dangerous doctrine and one which would be completely incompatible with the notion of the Charter as a system of arrangements among states.

We have had some experience with this alleged doctrine. They are not happy precedents to recall. Before World War I, the Russian Government had a doctrine of assistance to Slav peoples, which helped to bring turmoil to the Balkans and led to World War I. The argument is made in behalf of the Palestinians today. And of course it was the argument of Hitler when he proposed liberating the Sudeten Germans from the yoke of Czechoslovakia. It is an argument I regard as entirely incompatible with the possibility of peace and also entirely incompatible with our notions of international law that under the Charter force can only be used under the authority of the United Nations itself or by unilateral decision only in self-defense or in assisting a nation exercising its right of self-defense.

Mr. Falk has proposed that in circumstances of civil war the international community should accept and sanctify another very dubious precedent, quite as dubious as the precedent of Sudetenland, that is the nonintervention policy adopted during the Spanish Civil War. On that occasion Britain and France declined to help the Government of Spain, while Germany and Italy helped the revolutionaries. Some writers now contend that in such situations states should be legally free to help the revolutionaries, which has always been regarded as illegal.

These are the only arguments that have been addressed to the official position of the United States and its allies in South Vietnam throughout the period of the war. On paper, at least, the peace arrangements reached in Paris in January and March completely repudiate these arguments and confirm the position of the United States. For that reason, I was surprised to hear Mr. Falk say that he approved the Paris agreements. To me, they deny everything he has written on the subject for eight or nine years.

The Paris agreements necessarily rest on the proposition that there are indeed two states in Vietnam; that North Vietnam has no right to invade South Vietnam or to seek to coerce a political solution in South Vietnam; that it must withdraw its forces from Laos and Cambodia; and that it must pursue the ultimate reunion of Vietnam as a single state, if all the parties wish to do so, exclusively by political means. The only rights of self-determination possessed by anyone in this situation, these agreements say, are the rights of the people and political factions of North Vietnam.

We were asked today to talk about "the justness" of the peace for Vietnam. This, I submit, is the answer to the question provided by the standards of international law. The Paris agreements fully conform to the accepted norms of international law and faithfully reflect them and thus authoritatively answer the arguments which have been advanced in behalf of the claim that North Vietnam has a right to intervene in South Vietnam.

Thus I conclude that the Paris arrangement is the only arrangement that is compatible not simply with the Charter and the precedents under the Charter but with the political necessities which the Charter represents. The political process through which we have been seeking to vindicate these Charter provisions in Greece, and Turkey, and Berlin, and Korea, and now Vietnam has been a trying and costly period of great national effort. In that tragic struggle, we and other nations have deemed the safest rule to be that of the Charter, to accept no unilateral change in the relationship between the Soviet Union and the United States achieved by force.

We are deeply troubled today because the consensus which lay behind the American response to Korea in 1950 no longer dominates the national mind. Men think and believe and feel there must be something wrong with the ideas of the Charter, if they lead to such ghastly results as those in Korea and in Vietnam.

Many have forgotten, and others are not old enough to remember, the episodes of the thirties which led to the articulation of those rules in the particular form achieved at San Francisco. The invasion of Ethiopia, the invasion of Manchuria, German and Italian assistance to General Franco's revolution in Spain, these were all violations of international law then and they are violations of international law now. The conviction of the men of 1945 was that peace can only be achieved if such violations are met, and met early, before the momentum of war

becomes overpowering and sweeps all before it. We are now reexamining those ideas, trying to discover whether there is an alternative. Thus far, we have failed to produce one.

I submit to you that the agreements for Vietnam reached in Paris faithfully respect the concept of justice which underlies our international law. This is a problem altogether distinct from the justice of the internal organization of South Vietnamese society, about which Mr. Falk spoke. International law is largely concerned with the problem of maintaining the peace. Without general international peace, which requires strict curbs on the international use of force, men will not be free to pursue the other goals of justice, internal democracy, and internal social development, to which Mr. Falk referred.

Let me say this in closing: a rule of international law that condoned the international use of force in the name of self-determination or wars of national liberation could only multiply the horror of the processes of anarchy we see throughout the world, as guerrilla warfare spreads through individual and small group acts of terror. Such a rule would release international society from all the taboos and restraints which international law has so slowly and painfully built up since the 17th century to curb, limit, and ultimately abolish war.

In reply to criticisms from the floor, Mr. ROSTOW made the following remarks:

First let me make it clear at once that I am not speaking for the Administration. I left the Government of the United States on January 20, 1969.

Secondly, I was asked to talk for not more than 20 minutes, and I did want to expound the difficult question of the justness of the peace from the point of view of the standards of justice embodied in international law.

Third, if you will look at the March issue of the Yale Law Journal,* you will see that I have recently published a lengthy examination of this entire literature. I do not read the recent declaration adopted by the General Assembly as altering in any way, except conceivably for colonial regimes, the pre-existing international law under which it is perfectly legitimate to assist a state which is widely recognized and not legitimate at all to assist revolutionary forces within that state. Indeed, the declaration makes that point over and over again.

The reason I wanted to approach our topic in this way is very simple. In the long and troubled years of debate about Vietnam in the United States, we have lost sight of the fundamental line of reasoning and the fundamental line of policy which led us into the quagmire of Indochina with the full support of public opinion.

The speaker has said she is tired of these points. That is her right. But neither she, nor Mr. Falk, nor anyone else has shown why they are wrong.

* 82 YALE LAW JOURNAL 829 (1973).

I thought I had dealt with the points raised by Mr. Falk about the justness of the peace in my original presentation. Whether the President has served as an emollient or an irritant in our domestic affairs is an interesting question, about which I have ideas, but it does not seem to me to concern the question assigned us today.

I can add a word on the other issue raised, whether we are supporting peace or Thieu's regime. On the basis of long experience, I can tell you that that was never an issue. There was never an alternative to the policy that was pursued until October 1972, because the only issue ever presented, the only issue on which in 30 or 40 or 50 approaches we ever stuck, was that we would not accept the National Liberation Front as the sole legitimate representative of the South Vietnamese people. That was the sole issue all of those years and it is the issue now. When the North Vietnamese position changed on that subject in October 1972, an agreement became possible. That was the only issue, I can assure you, in all of the negotiations.

The CHAIRMAN called upon the speakers for their closing remarks.

Mr. FALK: With due deference to Mr. Rostow I was rather surprised for two reasons by the tenor and approach he has taken. Firstly he gave us a set of legal rationalizations on the underlying issue of American involvement in Vietnam vintage 1963 or so. This might be interesting for certain legal antiquarians, but it is not, I thought, the issue that we should have been discussing today.

Secondly, to associate his conception of international law with the text of the Paris agreements boggles my imagination. I defy him to reconcile his views of the settlement with several central provisions designed to alter the struggle within South Vietnam by specifying the sort of political competition that could serve as a non-violent alternative to the civil war that had been going on. Even Henry Kissinger is not such a loyalist as to argue Mr. Rostow's extreme position. In his January 24 press conference Kissinger said that the civil war in South Vietnam, not the civil war in *all* of Vietnam but the civil war in *South* Vietnam, is unresolved. Such a statement of fact has nothing to do with liking or disliking Thieu's regime. The agreement has certain provisions that do not allow Thieu to rule the way he has been ruling and, to the extent that he insists on continuing to keep political prisoners in jail and confines millions of refugees to the cities by not allowing them to go back to NLF-held territories, he is in flagrant violation of the agreement.

It should be noted, also, that Article 4 of the Paris agreement is a unilateral commitment by the United States not to intervene in South Vietnam. Interestingly there is no corresponding obligation on the part of North Vietnam contained in that article or elsewhere. Article 21 obliging the United States to contribute reconstruction aid is tantamount to a reparations obligation embodied in the main agreement. To analogize this settlement to the ending of the Korean War is so remote from anything contained in the Paris agreements or the situation which exists in real-world Vietnam, to borrow John Norton Moore's phrase, that

I find it difficult to respond. The issue in Korea was to recreate a solid line between the conventional armies of the two Koreas. The issue in Vietnam is to set up a political framework that can serve internal contending forces in South Vietnam as an alternative to battlefield civil war. The political alternative manifestly depends upon implementing those political provisions.

I have argued that President Nixon and the Administration could and should have taken an even-handed view of the agreement they negotiated. If we want to avoid the continuation of the war and avoid the necessity for reintervention, Washington has to take the *whole* agreement seriously, not just the provisions it likes. An opportunity for statesmanship in the cause of peace has been lost; it required taking the whole agreement seriously.

Therefore, I do find Mr. Rostow's entire approach disappointingly unresponsive to either the Paris agreements or the present situation in Vietnam.

Mr. ROSTOW: It gains nothing to say that my arguments are vintage 1963. The problem is not to classify them or to apply adjectives about them. Approaches like that are usually an excuse for not facing the issue. The question is, wherein am I wrong? The arguments of 1963, of 1954, and so on, have often been discussed, but in my judgment, which in this case is based on a recent re-reading of the whole literature, they have never been met or answered in a coherent, convincing factual way. The pattern of development of international law simply does not support the theories which have been advanced to answer them.

I quite agree with Mr. Falk that the arrangements posited at Paris anticipate a political process within South Vietnam. But it is a political process of concern only to the South Vietnamese, not to the North Vietnamese. I analogized the arrangements for Vietnam to those that terminated open hostilities in Korea for one reason and one reason only. However much Mr. Falk may profess to be surprised by it, they do indeed require exactly the same pattern of conduct on the part of North Vietnam, with one conceivable exception, that was required of North Korea, that is to say, to stay out of political affairs within South Vietnam, and to get out of Laos and Cambodia. There could be no argument, I think, with the fact that they are not yet out of Laos and Cambodia.

There is of course no question but that the Paris agreements recognize a state of political dissension within the separate state of South Vietnam, quite apart from the requirements of conduct which it imposes on North Vietnam. It announces certain rules for political reconciliation and development within South Vietnam on the part of the two South Vietnamese factions. How that process is going to be carried out, and indeed whether it is going to be carried out, and the role we have in trying to see that it is carried out, depend upon one thing which both agreements make very clear: the faithful observance of the cease-fire by North Vietnam and the United States, and by the two parties within South Vietnam. So far we have not reached that step. What leverage we might

have to interfere within South Vietnam if we ever reach that point, I don't know. Of course I am in favor of the fulfillment of those obligations and deplore interferences with them from either side. But I notice again that Mr. Falk is talking only about interferences from one side. And I repeat that the political terms of the arrangement are for the South Vietnamese, not the North Vietnamese or the Americans.

The key point I am trying to make here today is that it is essential to focus on one question of primary importance to international law and to the possibility of peace in our bitter and dangerous world. That is why I stressed the parallel between the Korean armistice and the Paris agreements for Vietnam. If we want to achieve a reasonably stable general system of peace, is there any alternative but to insist on the principle which governs both the Korean settlement and the Paris agreements for Vietnam?

BUSINESS MEETING

The business meeting of the American Society of International Law convened at 3:15 p.m., April 13, 1973, President William D. Rogers, presiding.

IN MEMORIAM

At the request of the President, the members rose and observed a moment of silence in memory of those members who had died during the past year.

COMMITTEE REPORTS

The President announced that the Executive Council, on the recommendation of the Committee on Annual Awards, had decided that the Certificate of Merit be awarded to Cyril E. Black and Richard A. Falk for their four-volume work *The Future of the International Legal Order*.

On the recommendation of the Committee on Publications of the Department of State and the United Nations,* the following resolution, supported by the Executive Council, was moved, seconded, and adopted:

Resolution on the Publication of *Foreign Relations of the United States*

The American Society of International Law at its 67th Annual Meeting in Washington on April 13, 1973:

Appreciative of the record number of volumes of *Foreign Relations of the United States* published within the past year, and of the increase in staff to compile *Foreign Relations*,

* See *infra* p. 306.

But concerned at the continuing long delays within the Department of State or in other agencies involved in the clearing of further volumes,

RESOLVES: To call upon the Department of State and on other agencies which may be responsible for such delays to take positive action to fulfill their obligations as given by President Nixon's directive of 1972 to cooperate fully to meet the objective of reducing the timelag behind currency in the publication of *Foreign Relations of the United States* to 20 years, and further

RESOLVES: That a copy of this resolution be sent to the President of the United States, to the Secretary of State, to the Secretary of Defense, to the Director of Central Intelligence, and to the Assistant to the President for National Security Affairs.

THE NEW WORLD POLITICS AND THE LAW
Presidential Address by
William D. Rogers

It is a custom of this Society to allow its President each year a few moments for his say. On occasion, this has thrown up gems for thought, such as Harold Lasswell's essay of a year ago.¹ Today may be a different matter. But tradition must be served.

There is really nothing one could add to the patent for this organization which Professor Lasswell laid down last year. So I propose a few reflections about the broader topic of the new world politics, and what it may mean for our chosen calling, of which this Society is, of course, the central professional institution.

I shall take it as an axiom that world politics has changed since we met last. The President's trips to Moscow and Peking are now capped by the Vietnam arrangement. However it works out, that agreement—an international legal instrument if there ever was one—must mark the end of one epoch of American foreign affairs and the beginning of another.

Certainly the general temper regards it so. There will be no nostalgia for the Vietnam phase of our foreign relations. We will never go back. Few say openly now that our involvement in that war was not a mistake. The debate instead is whether the entire fabric of U.S. foreign policy from which Vietnam emerged was not itself a colossal error—whether, in fact, as some claim, a generation of foreign policy managers was blind, corrupt, and hypocritical. What we are not debating, mark you, is a return to that policy. Whatever consensus governed our foreign relations from 1945 to 1965 is dissolved.

One way to express the nature of this change is to calculate the way we now look at the world. I think that the image which dominated the grand foreign policy process of the United States during the period from 1945 to 1965—in Washington, in the private councils of interested

¹ Harold Lasswell, *Toward a Continuing Appraisal of the Impact of International Law and the ASIL on the Transnational Decision Process*, 1972 PROC. AMER. SOC. INT. LAW, 66 AJIL (No. 4) 281 (1972).

citizens, and in the public press—was a spatial and geographic perception. According to that perception, the world was a two-dimensional phenomenon. Space was waiting to be divided up. Vacuums were as abhorrent to this spatially conceived world as they were supposed to be to nature itself. And it was this perception of power vacuums, first in Central Europe in the immediate postwar period, then along the Asian rim and in Latin America, and fitfully in Africa, in the fifties and sixties, which dominated American foreign policy during this period.

The overarching issue was how to meet Communist power in the competition to order the world and its parts. The final touchstone of policy was its relevance to the Cold War, and the competition between Washington and Moscow for all those spaces out there. And, since Moscow was monolithic, it was tempting to respond to it in an equally monolithic and tough-minded fashion.

It is scarcely surprising that the role of international law in the major world conflict issues was not a happy one during the postwar period. It seemed insignificant, when the major issue was meeting communism, to argue lawyers' niceties. General principles were softheaded. The manipulation of force and power was central to the foreign policy process. At the same time, international law tended to speak to the conflict decisions in terms of abstract normative principles of restraint. These, we all argued, should constrict the major actors on the world scene, and those actors should bend their will to the constriction. And so we were regularly embarrassed and saddened by the periodic reminders that nations—including our own—tended to ignore these normative principles, save to the extent that they could be used from time to time on the verbal level of the competition.

In short, international law, to the shakers and movers of the Cold War, was either a bore or a propaganda chip.

If I am right that international law played a peculiar role of relevance to the great issues of war and peace during the Cold War, then it may follow that international law will play a different role, and count differently on the scale of international affairs, in the new politics.

What may be said about this new world politics? The notion of the world as a series of vacuums to be filled by power has dissolved under the acid of Vietnam. It is not entirely clear how national attitudes will coalesce again, or around what central organizing perception. But, if we can see beyond the new and uncharacteristic tone of skepticism, irony, and loss of certainty in much of the current writing about world affairs, it seems to me that a new perception has begun to emerge to replace the old spatial notion, and that this new perception is a positive and hopeful one. It is that the world is a series of webs—webs of great complexity, with lines running in a multitude of directions, relating the interests of the world, each fragile but in sum of amazing tensile strength. The vocabulary which the commentators are using to describe this new perception seems remarkably consistent, if fairly graceless—"multipolarity," "interdependence," "mutuality of restraint." This language speaks to me of a growing feeling that force will be less sig-

nificant, less useful, and less determinative in the future than it has been in the past, and that nations are coming increasingly to realize that there are other counters in the effort to enhance their interests.

The new world politics, of course, is still dominated by the state. Our more fanciful hopes of peace a decade or two ago revolved around supranational groupings and regional and world organizations. These imaginings have been denied. The nation-state today is more powerful, more sovereign, more autonomous, and holds a tighter monopoly on the various forms of world power than ever before. But, interestingly enough, the old political coalitions of those states are disintegrating, and that implies a great deal in terms of the future of superpower hegemony over the foreign affairs of lesser states—of spheres of influence, if you like. The great days of NATO are over. The European movement, with so much going for it, is stalled. The East European system is hardly breaking new ground.

I have suggested elsewhere that the United States should consider, and even give some impetus to this breakup of the old coalitions. I tentatively pointed out that we might do this by proposing U.S. withdrawal from the political councils of the Organization of American States.² My purpose in this was not merely to remove the U.S. delegation from the awkward and embarrassing position of target for the barbs of the Latin American delegations over Panama and ITT. Nor was it just to recognize informally what has already occurred in fact, that the organization is already virtually a Latin American organization. Rather, the notion seems to me to fit with what I perceive as the broader process of change in the general world order, in which states will increasingly play the field, in which neither we nor the Soviets can hope to monopolize the international relations of even our closest friends, and in which the simplicities of interbloc politics of an earlier day have now been replaced by a perfectly bewildering maze of strange new groupings, passing coalitions, and temporary alliances.

If, in this new world politics, conflict issues are declining in importance, what is coming to the top of the world's agenda? There are several emerging key issues, it seems to me.

First, of course, is the continuing need to cope with the legacies of the old politics—the nuclear genie, the few hundreds of billions of arms expenditures each year, the development of new instruments for security, both among the great powers and at the regional flash points of the Middle East and Southeast Asia, to say nothing of Central Europe.

Second, is development, and the blunt fact that there are more hungry children in the world every year. The rich nations have gone to sleep over this issue. I cannot believe their stupor can long continue. This is particularly so because so much of the world's exploited resources are in the poorer countries. And the increasing rivalry for these

² William D. Rogers, *Adios, OAS: A U.S. Pullout Would Help*, Washington Post Outlook, April 8, 1973, Col. 3.

resources is bound to emerge as a truly biting issue of this and the next decade.

It seems to me fairly plain that there is a declining temptation for the nation to resort to force, when these, rather than spatial competition for influence and power, are seen as the dominant issues of international concern. In my view, this is not because nations are becoming more law-abiding, or that the moralities of nonaggression are finally beginning to carry the day. It is just that coercive strategies, in the web of the new world politics, are less and less useful. The restraints to the use of power today are not words, but the practical limits of utility in the use of force—a growing realization that cooperation usually gains more than coercion or threat, and an increasing interest in the ways in which a nation can use cooperation competitively. This really is what the opening to China is all about.

This contrast between an international relations strategy based on coercion and threat and one based on cooperation says something to me about my own personal experience. I joined the Alliance for Progress in late 1961. I did so because I had opposed the Bay of Pigs before it occurred, and was appalled by it after. The strategy of coercion, the use of dominant power, the manipulation of threat, which had formed so much of our policy in Latin America had, I thought, been finally discredited by the Bay of Pigs experience. I believed that the Alliance for Progress represented a new strategy of cooperation which would re-order our Hemispheric policy utterly. I was a bit premature, alas. As it was the Bay of Pigs, in a broad sense, which lured me into public service, so it was the intervention in the Dominican Republic which proved to me that coercion still had its charms, and drove me back to private practice.

Now I am prepared to hope that Vietnam can do what the Bay of Pigs could not do. Perhaps now we are really beginning to see the emergence of a long term pattern of noncoercive strategies in the foreign relations of this nation and the other powers as well. This would indeed be a new politics. Will not the role of international law be more central to the new politics than to the old? I think so.

I do not mean to say that international lawyers will be more important; the question is not one of professional label, but of the kind of discipline which comes to play in the mind of the decisionmaker. The point is that his tools in the era of cooperations strategies, I suspect, will be increasingly the tools of the law—the contract and transactional techniques which Larry Hargrove has so ably discussed in the Society's Ford Foundation Report; the balancing of claim and counterclaim; and, most of all, a capacity to define the complex elements of reciprocity embedded in every important foreign affairs decision and from which the common law of practice can develop—in short, the techniques of international law which can organize a coherent view of the world order.

From what I could tell during my own stint in the Department, the Seventh Floor had a linear notion that foreign relations was a string

of crises, and that, as one particularly important official used to say, the important thing was "just to stay alive." This was a denial of the legal view—and the chap was a lawyer. Now, I like to hope that the coherence of the international legal perception will have a wider audience than it did ten years ago.

But if this is to be so, the first and primal question, as we move from the old to the new world politics, from an era of coercion to one of cooperation, is the way we ourselves regulate the conduct of our foreign relations and the use of our force. Just as our perception of the world is changing, so is our perception of our own country. We now see ourselves, not as the hope and defense of all that is good and idealistic in the world against an implacable and perpetual enemy, but as a large country, not perhaps very different, although certainly richer and more powerful, than others, whose habits are occasionally wayward. And as we come to terms with this new vision of America, we must take account of the characteristics of our society and domestic political arrangements which account for our past errors, and begin to create systems to keep our enormous power in check. This notion of check, incidentally, is quite incomprehensible to a Cold War mind viewing the world through earlier perceptions.

This, it seems to me, is why the central legal issue emerging for our foreign relations now is the extent of executive prerogative. I am haunted by the paradox that, as imperialism and our own imperial pretensions wane, we should witness the presidency assuming its most imperial character. The nature of this imperial presidency is clear: a tendency to surprise diplomacy; a special importance to the personality and temperament of the person who happens to occupy the crucial pivot of White House power; an insistence in moments of crisis on the capacity of that personality for irrational action, and so forth.

I have said my say on the specific legislative proposals to regulate this question.³ This is not the place to repeat those notions. The broader question is, however, whether the use of force in international affairs should be subject to domestic legal restraint, of whatever kind. It has been put forth in the discussions that the foreign affairs prerogatives, including executive use of force, cannot be legislated, and that things between the President and the Congress ought to be arranged in friendly and informal consultation. Recent suggestions as to the scope of executive privilege are not very encouraging that this informal arrangement will produce much, or that the executive branch will be very forthcoming in the foreign affairs field.⁴

³ *Hearings on S. 731, S.J. 18 and S.J. Res. 59, Before the Senate Comm. on Foreign Relations*, 92nd Cong. 1st Sess., at 641–54 (1971); *Hearings on Congress, the President and the War Powers before the Subcommittees on National Security Policy and Scientific Developments of the House Comm. on Foreign Affairs*, 91st Cong. 2nd Sess., at 39–44 (1970).

⁴ *Kleindienst Sees Wider Executive Shield*, by Anthony Ripley, *New York Times*, April 11, 1973, at 1, 17.

I fear that an executive branch, beholden to no one, willing to consult with the Congress and inform the American people to the extent it pleases, managing and deploying the most powerful armed forces in the history of the world, is inconsistent with, and quite conceivably a threat to, the new world politics.

Cambodia, of course, is Exhibit A. The President's action there, whatever may be said of its political or military significance, has not yet been blessed with any serious legal justification. What does that say to the world of our commitment to the process of law?

This, it seems to me, is at this moment the central issue of law for our international relations in the new politics of the world.

REPORT OF THE EXECUTIVE DIRECTOR

It is fair to say that this Society at this juncture is in good shape, not least because of the constant care that Bill Rogers, as President, has given to Society affairs in matters large and small and the great skill he has brought to their disposition.

Our membership seems to be on an undulating plateau. We have gained about 100 members since last year, but the composition of our membership has shifted somewhat and in a way that is disquieting, disquieting at least insofar as it represents a drop in income. While we have had a gain in nonresident membership, and that is a happy thing, and in student membership and have about managed to break even, with some effort, in our regular membership, we have lost a number of professional members, those persons members of the bar for more than ten years. They pay the highest dues, which are by no means high relative to those of other professional associations.

Despite a vigorous recruiting effort, that category has dropped somewhat and, absent that effort, it would have dropped more. I think it suggests that we ought to think about how to grasp and hold the interest of the practitioner. That is, of course, not all we should think about. There are many things to weigh in the composition of the Society's programs, but it is an element, and I submit an important element and a source of concern at this juncture.

The warm cooperation evidenced at the annual joint luncheon of the American Bar Association and the American Society of International Law is reassuring. But we may well have to do more. We have made an effort to include in the program of this Annual Meeting subjects of interest to the practitioner. The Editor-in-Chief of the *Journal*, Dick Baxter, bears this problem in mind as well. In view of this falloff in professional membership, this clearly is a problem we have not yet successfully met.

The *Journal*, of course, is the principal link between the Society and most of its members. It is a worthy link, in its tradition and in its current character. For that we have particularly to thank the Editor-in-Chief of the *Journal*, Dick Baxter, and Brunson MacChesney who very

graciously served as interim Editor-in-Chief the year that Dick Baxter was on leave. It is one of the hallmarks of the Society's contribution that the bulk of that contribution is made through the voluntary, uncompensated contributions of its members. This is particularly notable in the case of editors of the *Journal*, many of whom do a good deal of work, and the Editor-in-Chief, who does a surpassing, one might call it a staggering, amount of work. For example, he has read 83 manuscripts this year on which, as he puts it, "cert was denied," those manuscripts not being circulated among the other editors. This is quite a burden to discharge, and he discharges it with his customary capacity and cheer.

Circulation of the *Journal* has grown modestly. It grows, of course, with the growth of membership plus the modest annual increase in subscriptions. The largely institutional subscription list is now about 2,900. So, the run of the *Journal*, membership being 5,500, exceeds 8,000 a year, and its real readership is far larger since the *Journal* is so widely subscribed to by libraries and referred to in course work.

Our junior periodical, *International Legal Materials*, continues to progress in a gratifying way—gratifying, that is, relative to the state at which it has been in the past. But in absolute terms, the distance it should grow seems to us still to be very large. Circulation is not yet 2,000. On its merits, it should be far larger, but nevertheless the percentage of growth each year continues to be solid, and its sale of back numbers very solid. ILM has reached the point, we now believe, when it can even produce a bit of income for the Society, that is to say, profit for the Society, as the *Journal* has for some time. All of you who know ILM like ILM. It is an extraordinarily valuable and innovative publication which probably makes more of a contribution to those who have fewer international legal facilities at hand than to those of us who have a plenitude of such facilities. Whenever I happen to be abroad, I never fail to encounter people who go out of their way to say how valuable they find *International Legal Materials*.

The Society, this year, launched a new venture in the publication of occasional papers, entitled *Studies in Transnational Legal Policy*. The first of these was a notable pamphlet on international monetary reform produced by our Panel on International Monetary Policy. It was followed by papers on the future of the International Telecommunication Union and on an ocean dumping convention. We hope to maintain this series as one of several outlets for the work product of our study panel program.

The student membership of the Society has continued to grow, as has the Jessup competition. One notable feature this year is that we have engaged a far larger number of teams from abroad than ever before. That is due both to the energy with which the Executive Secretary of the Association of Student International Law Societies, Carol Plumb, has pursued the duties this year, with the help of the excellent officers of the Student Association, and to the generosity of the State Department which pays the overseas travel of many of these teams to

Washington and takes them on a two-week tour of the United States after the competition ends.

The Jessup competition is an educational device of genuine value. It has become a pretty big show. In our terms, the slice of money that the State Department is good enough to devote to this matter is substantial. We think it is well spent, and we hope the Department will continue to concur in that judgment.

Speaking of funds brings me to the not altogether happy subject of our budget which was adopted by the Executive Council yesterday. The budget is fine, but it contains forewarnings of times that may be less satisfactory than the present. The grant, which the Ford Foundation has in recent days offered to the Society in renewal of the support it has been gracious enough to extend us since 1961, follows the pattern of the grant we received three years ago. It sharply reduces the proportion of Ford's support of the Society, and, I regret to say, it also reduces that support absolutely.

For the first ten years of the Ford grants (1961-1970), the Society was supported to the extent of some 48 percent of its budget; the last three years it has been 27 to 28 percent. It looks now as if that will drop to about 20 percent. At any rate, we had on the order of \$150,000 a year of Ford money to dispense during the last three years. We shall have \$100,000 a year to dispense over the next three years.

The Ford Foundation has coupled this offer of renewed support with the gratifying indication that it is not put to us as a terminal grant. Therefore, I believe, if we maintain the quality of our programs, we can look forward to the possibility of renewed support from the Foundation, although in what measure we do not know. Nevertheless, the immediate reality is that we will have to contend with \$50,000 a year less in Ford Foundation income in this fiscal year and in the two that follow. That reality is the harsher since the Ford Foundation has tightened the matching requirement for the new grant period. On the last grant, the Society was obliged to raise \$3 from whatever source for every \$1 of Ford money paid out. We shall now have to raise \$4 from other sources for every \$1 of Ford money we receive. That is a tall order. The burden of fund raising these past three years has been heavy. We have more than met the matching requirement, but we have had some good luck. It is uncertain whether our luck will hold. What is certain is that we must attack the problem with more vigor and diversify our sources of support, both large and small.

In the course of discussions with the Ford Foundation, I should say frankly that we resisted this cut. We saw it as painful, as something that we might not be able to overcome, and if we could not, then we could only cut our programs back. One of the points the Foundation put to us was this: Look, the Society's membership—I am virtually quoting now—is rich and influential, and if you fellows are as good as you think you are, and as we think you are, then your constituents should do more for you than they have been doing. If the bar, in particular,

attaches importance, as the Ford Foundation trusts it does, to this Society and its work, then it should do a good deal more by way of supporting it financially. That was put as a generality. There was no specific injunction or program, but this is a challenge that we shall have to think about and act upon.

That challenge was, in a measure, put to us three years ago, and then we did raise our dues substantially. We raised the price of subscriptions to the *Journal*, and that brought in much more income. Until we raised dues, the membership of the Society was steadily ascending, but since then the ascent has been stopped in some categories and has been much slower in others.

In the budget just adopted by the Executive Council, only one modest step was taken. In respect of dues it was decided to increase the dues of nonresident members from \$10 a year to \$15. This step was taken in the light of the fact that those dues have been in force since 1961, that the inflation since then has been very great, and that the dollar has twice been devalued. It was the general judgment that to increase other dues would be counterproductive or so modestly productive as not to be prudent. The Council also decided to increase the price of *International Legal Materials* to institutions from \$35 to \$45 a year, with a view to producing more income and in the conviction that the traffic will bear the increase. *International Legal Materials* is indeed worth far more, particularly when compared to the price of services that are regularly sold to law firms and to libraries. The demand for ILM among individual members of the Society being viewed as more elastic, the price to them will not be increased. The funds produced by those two steps will in some measure moderate the impact of reduced Ford support.

In addition, last year we prudently decided to invest some of our Mellon Foundation grant in producing a dicennial cumulative index to the *American Journal of International Law*. We hope that libraries subscribing to the *Journal* will subscribe heavily to the cumulative index, as reasonably they should. If that hope is not misplaced we estimate, conservatively, that we will get some \$25,000 in income this fiscal year from sales of that cumulative index to our members and to institutions. In putting that transient source of income together with the more permanent ones just described, we hope we can bridge the gap for this year and maybe even produce something of a surplus to assist us next year.

Next year, the financial outlook is grimmer still because Ford Foundation support will decline further. They propose to give us \$100,000 a year for three years but not in even tranches, rather \$110,000 this fiscal year, \$100,000 the next and \$90,000 thereafter. Moreover our current Mellon Foundation grant, as projected, ends next year, and is down from \$50,000 last year to \$30,000 this year.

I do not mean to detain you unduly with these financial details, but I do wish to say that we have our work cut out for us and that we shall be soliciting the assistance of our membership in various ways.

For example, we may have to cut down on the membership of our study panels, and I hope those of you who are cut out will understand why.

At some juncture we may have to cease paying expenses to our panel members. We shall not have to do so immediately, but we will have to begin to think of various economies, particularly if we are not successful in raising consequential sums of money from other sources. We shall of course make every effort to raise such sums.

REPORT OF THE DIRECTOR OF STUDIES

The Society has three separate kinds of research and study activities. The largest component of the program is in the form of research and study panels and the various working groups which these panels form for the pursuit of particular projects. As of the end of the year with which we are concerned, 17 panels were in operation at various stages of their life span, and some eight working groups. Two or three panels were phased out and two or three new panels created so that the numerical level of activity over the year remained about the same.

The second major category of research or study activities that the Society has characteristically engaged in during the course of the past year has been special or ad hoc meetings, panel-like in their functioning, but ordinarily lasting for only one day. There have been two such meetings in the past twelve months.

The third form of activity is the Society's relatively new experiment in major in-house research projects. I refer to the project in international regulatory regimes, directed by David Leive.

In the communications during the course of the past year between the Society and the Ford Foundation, we were rash enough in describing our study panels to propose a sort of crude map of the international legal cosmos which we felt might facilitate explaining to our benefactors what it was we thought we were about in the research and study activities of the organization. With your indulgence, I would like to invoke that map not in order to produce any disputations among the many eminent international legal cartographers among our members, but simply as a means of convenient explication.

The first component of the program is those activities dealing with what we have called the "law of the political framework." A number of activities have fallen within this domain in the past, in particular the Panel on Self-Determination which has been phased out. A working group on the question of Namibia and its status in the international legal order is another example.

Two panels notable in this field are in existence at the present time: the panels on State Responsibility and State Succession, both of which are designed essentially (although in the case of the former not exclusively) to follow the consideration of their respective subjects in the UN International Law Commission. The panels have proceeded

at a pace geared in large measure to the pace of the Commission's consideration of these questions during the course of the past year.

The Panel on the Law of Treaties was the Society's first major undertaking in this domain. Another, the fruits of which were ripened in the course of the last year, was the Panel on China and International Order which was concerned essentially with China's role as a participant in the international system. The major product of this group was the book recently published under the editorship of Jerry Cohen of Harvard Law School.

Another panel, still prodigiously productive in this domain, is the Panel on the Role of International Law in Civil Wars, of which one of the most active participants and one of the most productive members has been Dick Falk. This panel has produced in all nine volumes, some of which have been produced in the course of the past year or are in press. Those in press include a volume on the Middle East edited by John Norton Moore; a collection of essays, *Law and Civil War in the Modern World*, also edited by John Moore, which is shortly to be produced by the Johns Hopkins Press, and you will be interested and I think pleased to know that a fourth volume of the series on *The Vietnam War and International Law*, a volume directed largely to the issues of the settlement, is now contemplated, although no concrete steps have been taken toward putting that volume together.

Bill Rogers mentioned the concern of international lawyers with the management of the state's participation in the international legal order, in particular the internal management of foreign relations and the degree to which international legal constraints or implications for policy are taken into account in the formulation and execution of it. The Society has been freshly concerned with this area, through the formation of a Panel on the Constitution and the Conduct of the United States Foreign Relations. This panel is not limited to constitutional considerations but concerned with the whole panoply of legal, including constitutional, aspects of the formulation and execution of foreign policy in this country.

Another organ, the Panel on the Role of International Law in Government Decision-Making in War-Peace Crises, has also been concerned with the question of how international law is taken into account in the policy process. This group is in the process of completing a series of monographs which are to be published as a single volume on the role of international law in various well-known international crises during the last two decades, including Suez (1956), Cuban Missile Crisis, the Cyprus affair in the early sixties, and others. As a second phase of its work the panel has broadened the scope of its concern beyond decision-making in war-peace crises by undertaking an inquiry into the instruction in international law carried on in the United States higher service academies. This study is being done by Dick Baxter.

We have also been concerned with what we have called "subglobal systems" in the political and legal organization of the world: first through our Panel on Regional Integration which was wound up in the course

of the past year and secondly through the Panel on Inter-American Legal Questions. The latter has functioned in a highly specialized way in the course of the last year, holding itself in readiness to address particular legal questions of especially hemispheric content or import as they arise rather than acting as a continuing body which operates on the assumption that there is a body of hemispheric international law which requires running scrutiny. Its meetings during the past year concerned private international law, a domain in which this Society's research and study activities have been fairly scarce.

Two different panels have been concerned with procedures of the international system. The Panel on the Future of the International Court of Justice is in the process of producing a book comprising papers commissioned by the panel from various of its members. The book is under the editorship of Professor Leo Gross, the rapporteur of the panel. We have had also a Panel on Protection of Diplomats, under the chairmanship of Professor Alona Evans, which has been concerned with efforts through the formulation of treaty law to deal with the question of safeguarding members of the diplomatic community, and perhaps other special representatives of governments abroad, from the exercise of coercive violence against their persons in one form or another. This panel has also undertaken what in my judgment has been a very useful review of the similar efforts with respect to international terrorism that have focused in the consideration of the question of a terrorism convention in the UN General Assembly.

Bill Rogers referred to the "international law of transaction" without engaging the time to explain what we have had in mind in using that vernacular. Let me refer to two or three of the Society's undertakings within this field. We have had for several years a Panel on the Regulation of International Trade, the primary function of which has been to review a manuscript being produced by its Chairman, Stan Metzger, dealing with a variety of regulatory devices. That volume is now in press and should appear in the course of this calendar year. The Society commissioned some years ago a series of volumes on foreign enterprise in various countries, a number of which have been published. The last of this series, a long awaited and excellent volume on foreign enterprise in Japan, is finally in press and will appear in a matter of months.

We have categorized a broad range of the research and study activities of the Society as concerned with "the law of the community heritage": the management, through such rudimentary devices of community authority as may have been developed at the international plane, of what might fairly be called the natural and cultural heritage of mankind as a whole. The problems that the Society has dealt with in this broad domain are quite diverse. They include the preservation of national art treasures on which we had a panel that is now formally wound up; the effects of its very fruitful activity are, however, still being felt. Also included in this category are the protection of human rights; the twin problems of the rational utilization of technology and the preservation

of the environment of the planet for human or other habitation; and finally the management of the apparatus of economic production and exchange.

The Society has two panels in the broad field of human rights. The Panel on Humanitarian Problems has been concerned in the latter phases of its life with scrutinizing the work product of the Geneva Conferences of Government Experts, convened by the International Committee of the Red Cross, to supplement the Geneva Conventions of 1949. It has held a series of meetings for the purpose of a systematic review of the results of these conferences in which government and international organization officials, practitioners, and university people have participated.

The Panel on Human Rights Law and International Implementation has been concerned in the course of its life with a wide range of problems. At the moment it is concerned with the scrutiny of the Convention on the Elimination of Racial Discrimination from the point of view of the worthiness of this instrument for ratification by states. A further activity of this panel is a proposed volume in the form of a compendium on "new frontiers" in the international implementation of human rights, which would examine, initially at least, selected problems in the inter-American system for the protection of human rights and the implementation of the United Nations human rights law. To this end the panel is meeting in a few days with the Inter-American Commission on Human Rights and will in the course of the same meeting chart a course for this compendium.

The Society has expended fairly sizable resources, largely obtained from the National Science Foundation, on questions of the relation of international law and institutions to the management of science and technology and the protection of the environment of the planet. In 1970 we undertook to reorganize some existing activities in this field to bring them under somewhat more unified management. The result was a set of five panels on the law of the sea, nuclear energy, telecommunications, environment, and lastly research planning in the field of science, technology, and international law. The work of the Panel on International Law and the Global Environment is currently centered on a working group formed jointly with the Panel on State Responsibility. This group is pursuing the question of the development of the law of state responsibility for transnational environmental injury, taking off from the injunctions to develop this law and from the quasi-legal foundations for such development found in the Declaration of Principles by the UN Conference on the Human Environment.

A somewhat similarly conceived working group was formed jointly between the environment panel and the Panel on the Law of the Sea. It is in the process of producing a book length study of marine environmental protection, of which the law of state responsibility might form a small part, but which will be concerned largely with conventional or treaty measures. The group is trying to look at this subject from the perspective of its role as an item on the agenda of the Law of the Sea Conference for which preparations have been underway for some

time. This group also produced, through a specially composed working group, the study on an ocean dumping convention which was published as a part of our new series of occasional papers, *Studies in Transnational Legal Policy*.

The Panel on Nuclear Energy and World Order has produced two books: one on nuclear safeguards, that is safeguards with respect to the peaceful uses of nuclear materials, to be published shortly by the Johns Hopkins Press, and another comprising an analysis of the strategic arms limitations talks and the prospects for the future of these talks. The manuscript for this volume has been completed and is being considered by a number of publishers.

The Panel on International Telecommunications Policy has produced a study with respect to the future of the International Telecommunication Union, a followup on an earlier study of issues relating to the future of the ITU. It has formed a working group on technical problems respecting the regulation, probably through the ITU, of broadcast satellites. It has formed a further working group on the so-called political problems of direct broadcast satellites which are currently being mooted in the UN General Assembly and in a subcommittee of the UN Outer Space Committee.

The Panel on Science, Technology, and International Law was established largely for the purpose of planning research and forecasting. This Panel, which Oscar Schachter has very ably chaired, has produced among other things an interesting proposal for a project respecting the international management and control of information-gathering technologies of a variety of sorts. The basic notion is to look as a whole at various technologies ranging from conventional ocean research to earth resource satellites to devices for the use of computer technology for the retrieval and storage of information across international boundaries. Such a project is in the planning stages.

I turn finally to the research work of the Society which is directed toward questions of international management of the apparatus of economic production and exchange. You are familiar with the highly successful work of the Panel on International Monetary Policy which has completed its activities. I have already mentioned the work of the panel chaired by Stan Metzger. In addition we had a special meeting in the course of the year which was a very lively and useful discussion on the Chilean nationalizations and their relation to international law. The product of this meeting is in process of publication in various individual ways.

The Board of Review and Development has authorized, and we are planning to establish, a Panel on International Trade Policy and Institutions for which a preparatory paper has been commissioned. We hope to get such a group underway before the end of the academic year. In this general area, we have also formed a group on the multinational enterprise and its effect on the formulation of U.S. foreign policy. The primary role of this group, in the one meeting it has held thus far and in another meeting which will be held in a matter of a few days, has

been to discuss with members of the staff of the Subcommittee of the Senate Foreign Relations Committee, headed by Senator Church, problems related to the inquiry which that Subcommittee is conducting. Thus far this has been a very useful exercise.

The PRESIDENT complimented the staff on the way in which it had carried forward the affairs and activities of the Society during the past year. He announced that the Executive Director had accepted the post of Counselor on International Law to the Department of State for the period July 1973—June 1974 but that he planned to return to the Society after that time. During his absence, Larry Hargrove would act as Executive Director, with an additional staff person, soon to be appointed, to assist him.

ELECTION OF OFFICERS

The Secretary of the Society, Judge DUMBAULD, introduced the report of the Nominating Committee. On a motion from the floor, the Secretary cast the unanimous, official ballot for the slate as nominated. The following were declared duly elected:

Honorary President: MYRES S. McDOUGAL

President: WILLIAM D. ROGERS

Honorary Vice Presidents: WILLIAM W. BISHOP, JR., HERBERT W. BRIGGS, ARTHUR H. DEAN, HARDY C. DILLARD, CHARLES G. FENWICK,* LEO GROSS, GREEN H. HACKWORTH,* JOHN N. HAZARD, JAMES N. HYDE, PHILIP C. JESSUP, HANS KELSEN,* HAROLD D. LASSWELL, MONROE LEIGH, CHARLES E. MARTIN, BRUNSON MACCHESNEY, OSCAR SCHACHTER, JOHN R. STEVENSON, and ROBERT R. WILSON.

Vice Presidents: RICHARD N. GARDNER, ERNEST A. GROSS, ROSALYN HIGGINS, STEPHEN M. SCHWEBEL.

Members of the Executive Council to serve until 1976: RICHARD R. BAXTER, MARY ELLEN CALDWELL, CARL Q. CHRISTOL, HALIBURTON FALES, II, CLARENCE CLYDE FERGUSON, JR., RICHARD B. LILlich, J. GREGORY LYNCH, BURNS H. WESTON.

NOMINATING COMMITTEE

The PRESIDENT thanked the Nominating Committee, and its Chairman, Mr. Debevoise. He announced the Executive Council's recommendations for a new Nominating Committee. There being no other nominations, the following were declared duly elected:

JOHN R. STEVENSON, Chairman, MICHAEL BARKUN, AARON BROCHES, TOM FARER, and JAN SCHNEIDER.

OTHER BUSINESS

With regard to Regional Meetings of the Society, Mr. SCHWEBEL noted that there had been the usual number this year (15) but they had been of unusual quality. A number of them were genuinely first class, both

* Since deceased.

in terms of conception of program and participation of speakers. Moreover, attendance was better this last year than in the past. He thanked the Chairman of the Committee on Regional Meetings, Mary Ellen Caldwell, and James Nafziger of the Society's staff, for an exceptionally successful program of meetings.

In response to a question from the floor, Mr. SCHWEBEL commented on the Report of the Special Committee on the Library. The Committee was set up to consider the future of the Society's Library in Tillar House because of the great pressure on the Library in terms of space, the endemic problem of libraries which in our case is magnified by the size of Tillar House. That is to say, the space is small and the growth in international legal literature is large. Moreover, the Society's splendid librarian, Mrs. Helen Philos, labors away without the help of a full-time, trained assistant librarian. She has had some part-time, relatively untrained assistance which has been useful but not adequate.

In the Special Committee, under the chairmanship of Walter Surrey, varying views were expressed. There were those who were exponents of a bigger and better Library and the devotion of larger Society resources to it. Others on the Committee, while sharing that as a desideratum, felt that the demands on the Society's resources were so many that priority should not be given to an instrument of the Society's program which is largely local in its impact rather than national or international. They also felt that basically the problem of space was insoluble. Those two extremes of thought conjoined in a possible solution in cooperation with the Carnegie Endowment for International Peace. As you know, for most of its life, the Endowment had a center in Washington; and it may reestablish a center here. If so, in such a center there may be considerably more space for a library than Tillar House could ever afford. Hopefully, arrangements can be worked out with the Carnegie Endowment, should they secure a building within walking distance of Tillar House, to establish a joint library of the Society and of the Endowment. The Society would contribute its substantial, excellent collection on international law with the reserved right to retrieve it should ever the joint library cease to operate. The Endowment would contribute larger space, would engage Mrs. Philos, would engage one or more deputy librarians, would supplement the international legal component of the library with an international relations component, and would meet all the expenses of the upkeep and expansion of the library, both content and staff.

It was the conclusion of the Committee that if such an arrangement with the Endowment or possibly another institution could be worked out, we should do so. The result would be a better library fulfilling the needs that our Library now fulfills, but absolving the Society of an expense which is now annually just short of \$20,000. In the precarious financial state of the Society that would be a welcome relief.

So, the recommendation to be submitted to the Executive Council by the Committee is that this possibility of a new and further joint relationship with the Carnegie Endowment be pursued as opportunity

presents. Should it not work out we would take another look at the problem, and in the meantime maintain the Library in its present not wholly satisfactory but certainly very valuable state.

Asked to comment on the activities of the Student Societies, Mr. SCHWEBEL explained that he had little to do with them, since they ran themselves remarkably well.

The Society was glad to have in residence at Tillar House an Executive Secretary of the Student Association who is the administrator of the Jessup competition, and, insofar as time allows (and it does not allow very much), a fellow of the Society who takes a certain part in our study panels. That facility was originally provided by a grant of the Henry Luce Foundation which unfortunately was not renewed. Since then, we have managed to keep afloat by the application of some of the general support funds of the Mellon Foundation, and by a grant from the Dougherty Charitable Foundation for this year's Jessup competition.

There has been a gratifying growth in the number of student international law societies throughout the country and a remarkable growth in the number of international law journals published by students in law schools. For those who say, and perhaps rightly, that concentration on international affairs among the American student body has lessened and that this lamentable development has carried over, as I feel, into the international legal sphere, at least we can respond that the times cannot be too bad if students can support 17 international law journals, some of which are of very high quality. The Jessup competition flourishes both abroad and here. We hope we can maintain this momentum of activity and find the funds to do it.

The PRESIDENT announced that the Executive Council had elected the following to the Advisory Committee of *International Legal Materials*: Marjorie Ann Brown, Georges Delaume, John H. Jackson, and Seymour Rubin. To the Board of Editors of the *American Journal of International Law*, the following were elected: Richard R. Baxter, Editor-in-Chief, Covey T. Oliver, Oscar Schachter, Louis B. Sohn, Eric Stein, John R. Stevenson, and Thomas Buergenthal, the latter being elected for the two years remaining of the term of the late Wolfgang Friedmann.

There being no other business, the PRESIDENT adjourned the meeting at 4:45.

Saturday, April 14, 1973 at 10:30 a.m.

THE PHILIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION

Case Arising Out of a Dispute Over Fishing Rights

NEPTUNIUS v. ATLANTICA

Judges of the Moot Court:

The Honorable WILLIAM O. DOUGLAS, Associate Justice of the
Supreme Court of the United States.

His Excellency ARVID PARDO, Minister of Oceanic Affairs for Malta
and former Ambassador to the United States.

MYRES S. McDOUGAL, Sterling Professor of Law, Yale Law School.

Finalists:

Brunel University (United Kingdom) v. West Virginia University

H. PHILIP STOPFORD
JAY W. MOLYNEAUX
GRAHAM CUNNINGHAM

JAMES E. ROARK
MICHAEL J. FARRELL
OLIVIA C. BIBB
RUSSELL M. CLAWGES, JR.
WILLIAM S. CALWELL, JR.

West Virginia University was awarded the Jessup Cup and Brunel University was declared the runner-up. James E. Roark of West Virginia was declared the outstanding oralist of the Competition.

West Virginia University was the winner of the national semi-final round. California Western School of Law and Vanderbilt University tied for second place and also tied for the best memorial award. Timothy Noel Smith of California Western received the plaque for best oralist. The Rutgers Society of International Law award for the best memorial in national regional competitions went to Washington & Lee University.

In the international round, Brunel University (United Kingdom) won first place, the University of Toronto (Canada) was runner-up and the University of Lagos Law Faculty (Nigeria) was third. Mrs. Niloufer Vishnu Bhagwat of Bombay University (India) was best oralist and the State University of Utrecht (The Netherlands) received the prize for best memorial.

The semi-final teams were:

Domestic

California Western School
of Law
University of Kansas
Suffolk University
Syracuse University
Vanderbilt University
Washburn University
West Virginia University

International

National University of Rosario (Argentina)
University of Toronto (Canada)
Haile Sellassie I University (Ethiopia)
Bombay University (India)
Lewis Arthur Grimes School of
Law, University of Liberia
State University of Utrecht
(The Netherlands)
University of Lagos Law Faculty (Nigeria)
University of Singapore
Brunel University (United Kingdom)
University of Zambia School of Law

ANNUAL DINNER

Saturday, April 14, 1973 at 7:30 p.m.

REMARKS BY TOM J. FARER

Chairman of the Committee on the Annual Meeting

I take great pleasure in welcoming you to the Society's Annual Dinner. The fact that we are all here tonight is a kind of collective rejection of the view a cynical friend of mine suggested the other day: that the practice of international law is analogous to rearranging the deck chairs on the Titanic.

I note that some of you are still eating. Perhaps irrelevantly, certainly irreverently, that reminds me of the French epicure who once remarked: "After all, in what consists the difference between man and beast except in the possibilities of the former to learn the art of dining, while the latter is forever doomed to feed."

I am tempted to start tonight with what I call the Dick Falk gambit. Many of you who have seen Dick in action will recall that he usually starts with something like this: "I have a deep sense of intimidation," he says with a kind of masochistic relish, and then he quickly sets about flagellating his intellectual opponents.

To be honest, there are two reasons why I do not have a deep sense of intimidation: one, I can sense that I am among friends, and two, this is the first time in a meeting with Myres McDougal that I will enjoy both the first and the last word.

I should tell you that every Chairman of the Annual Meeting has a vision of creating the New Jerusalem. He imagines new formats, new ideas, new panels, nothing short of a major intellectual breakthrough. I, however, was forced to entertain more modest ambitions, for it was impossible to improve significantly upon the rich intellectual fare provided by my two predecessors: John Norton Moore in 1971 and Burns Weston in 1972. Indeed, there has been some argument that last year's affair was too rich, at least in terms of the number of panels, since the staff was forced to rescue several members who were standing dazed at a point midway between three different rooms—somewhat reminiscent of the determinist's donkey who starved to death because he was unable to choose between two equally distant and succulent bales of hay.

Since I could not innovate on the intellectual side, I decided I would emphasize egalitarianism and cuisine. Let us take egalitarianism first; I would like to keep the defeats for last. I told Steve Schwebel that at previous dinners, when I was sitting down where you all are now, I felt that it was slightly hierarchic (a) for there to be a dais, and (b) for people on the dais to be introduced. This suggested that we were not all equals.

I suppose, although Steve is kind enough not to say so, that my concerns reminded him of a story Dick Baxter likes to tell. The story, as I

recall it (and I recall it well because Dick has told it many times), is that two wealthy matrons met one morning in Palm Beach. (The locale varies, but the matrons are always there.) One says to the other, "I thought one was not supposed to wear diamonds in the morning." The other, who happened to be wearing diamonds, said, "I thought so too, until I could afford some."

But I don't think Steve took me seriously. I don't think he regards me as an egalitarian. Perhaps that is because, while most egalitarians are alleged to believe in leveling down, I believe in leveling up. What this means, I suppose, is that not only I but also the average English dustman—wonderful euphemism—should be able to drink Chateau Mouton Rothschild. I have not faced the possibility that if we both do so, neither of us may be able to do so. Or to quote the immortal line of W. Gilbert: "When everybody is somebody, then no one is anybody."

Getting back to my idea of no introductions, Steve Schwebel remarked that I had a good idea but for the wrong reason. The problem was not one of equality but redundancy. Everyone on the dais is always sufficiently celebrated that no introductions are needed, with the possible exception, Steve pointed out, of the Chairman of the Annual Meeting. This made me feel like that truly obscure comedian who went on a benefit show after Jack Benny, Bob Hope, and other luminaries had made their appearances. The poor man staggered out on the stage to perfunctory applause, looked around, and said: "I feel as if all the world is a tuxedo, and I'm a pair of brown shoes."

Obviously, the only possible riposte to Steve's observations is to introduce our guests. I ask you to regard the members of the dais benevolently, and they shall smile benevolently at you: Mika Farer, Stephen Schwebel, Kathryn Gross, William Rogers, Val Dillard, Myres McDougal (about whom I shall say a great deal shortly), Rosalyn Higgins, Judge Hardy Dillard, Suki Rogers, Ernest Gross, Ann Hughes Hargrove, John Hazard, Louise Schwebel, and John Lawrence Hargrove.

Now I turn to the delicious process of introducing our Honorary President. A man whose name is readily forgettable, as evidenced by the fact that I have forgotten it, once remarked: "The English instinctively admire any man who has no talent and is modest about it." We admire Mac in this rather more competitive and aggressive society because he is so talented, and we are deeply fond of him because he is modest in the most meaningful sense. He believes that many others, including those who read his books, are equivalently endowed.

As some of you may know, he has been compared favorably to James Joyce. As Joyce extended the precincts of Dublin until they reached the ends of the earth, so Mac has enlarged the Yale Law Quadrangle to embrace the whole public order of the world. Or would it be fair to say that he has compressed the world public order into the delightful precincts of the Yale Law Quadrangle?

It is also, I think, entirely fair to compare them because both have had profound impacts on the English language as we once knew it. I will concede, because it is a necessary concession, that some of my students to

whom I have tried to explain the doctrine of the Yale school have been inclined to suggest a slightly more apposite, in their minds, literary reference, that is, to Kafka. But I have assured them that, although they may feel like Joseph K. as they first try to master this marvelous system (which I myself have not mastered but often use), there is indeed a castle at the other end. To which a student who failed my course once responded by noting that Joseph K. did not survive his trial.

Before actually bringing him forward, I want to say that when I introduce Mac, I think—not because it is relevant, but because it is such a vivid contrast—of something Will Rogers once said. When asked what he thought of Calvin Coolidge, he replied: “He don’t say much . . . but when he does, he don’t say much.” On the other hand we have Myres McDougal, who says a lot, and I assure you, although you need no assurance, that when he says a lot, he says a lot. I give you Myres McDougal, our Honorary President.

REMARKS BY MYRES S. McDOUGAL

Honorary President of the Society

If you are wondering how an old politician from Mississippi gets himself caught in this situation, sandwiched between an introduction by Tom Farer and a major speech by Hardy Dillard, I am even more puzzled than you are.

I deeply appreciate the warmth of the introduction and have been trying to think of appropriate replies to all the kind things Tom has said. As to Tom’s reference to my modesty, I recall that when Winston Churchill was told that Clement Attlee was a modest man, his retort was: “What does he have to be modest about?”

Coming back to this problem of just how I happen to find myself here, my telephone rang in the middle of the night some weeks ago and it was Whitney Debevoise. He was very excited. He had great news for me. I thought he was going to offer me a big part in a big case, or admit me to the International Commission of Jurists. Instead, he said, “Our Committee wants to nominate you for Honorary President of the Society.”

You can imagine how that hit me. I said, “I’m not that decrepit and senile yet. Why don’t you make Phil Jessup continue?”

Whit came back, “Phil won’t do it because there is too much the Honorary President has to do. He had a hard life over at The Hague and now he has retired and wants to rest.”

As my next avenue of escape, I said, “The next most venerable member of our group is Judge Hardy Dillard. Why don’t you ask him to do this?”

Whit replied. “Well, we consulted Judge Dillard and he finds a conflict of interest. He thinks the duties of Honorary President are so onerous that it would interfere with his work on the Court.”

I named two or three other members of the Society who I thought were a little more venerable than I, to which the reply was that the Committee couldn’t agree on them. I finally said, “If I’m the only guy who will take it, I’ll do the best I can.”

To continue the story, the next morning at breakfast I told my wife I was going to be nominated Honorary President of the American Society of International Law. The only thing she said was: "I was reading Thurman Arnold's autobiography last evening and he writes that the wind in the winter blows so hard in Laramie that when it stops the people fall on their faces."

Now, I knew she could not be talking about Phil Jessup blowing a big wind. She could not be talking about the Society falling on its face. I decided I had better get a sense of proportion.

Shortly thereafter, I received a very nice letter from Steve Schwebel informing me that, as one of my duties, I would be asked to present the awards this evening. Then this afternoon Steve says to me: "You remember how hard it is for Hardy to wake up and get going in the morning. He is going to make the major address this evening. Would you talk for about an hour on the nature of international law so that Hardy can collect his thoughts and reorganize his old jokes?"

Hence, finally I find myself here with the duty of making an hour's speech on the nature of international law, better perhaps to prepare us for the dance band that is beginning to be in evidence. As a matter of fact, after listening to the very wonderful program arranged by our officers for this Annual Meeting, I think international law is in pretty good shape. If Gene Rostow and Dick Falk (both my former students) can speak from this platform without somebody fighting, I think international law is keeping the peace. When John Norton Moore and Charles Brower can talk about the war powers of the President without someone throwing the table at them, I think that law is doing pretty well.

On the larger scene, we might note what the International Court of Justice has been doing in recent times. The opinion of the Court, probably written by Judge Lachs, in the *Namibia* case is the potential great *Marbury v. Madison* of international law. The Court not only assumed the power of judicial review but found a legislative competence in the UN General Assembly and the Security Council. I read the opinion of the Court and thought it wonderful. Then I turned to the separate opinion by Judge Dillard—our bold, imaginative, innovative friend from Virginia, from whence John Marshall came—and suddenly I found that it is not *Marbury v. Madison* but something much more timid. I could not help but recall one of Hardy's favorite stories.

A famous English Lord (probably Balfour) on a visit to the United States was invited to one of those luxurious apartments in Connecticut. He bought a ticket on the old New Haven and Hartford. When the conductor came along, the Lord ran through his pockets but couldn't find the ticket.

The conductor looked at him and said: "Lord Balfour, I know who you are. I saw your picture in the paper last night. You don't have to find the ticket. Just send me a check when you get home."

The Lord replied: "My man, you don't understand. I have to find that ticket. If I don't find the ticket, I don't know where I'm going."

I can't help but wonder, as I read some of these recent opinions, just where the Court thinks it is going.

I will say this. Hardy's eyesight is obviously improving. If he could become as good a judge of justice as he is a judge of beauty, international law would be in much better shape than it is today. We are very, very happy to have Mrs. Dillard join our group.

While I am paying compliments in a serious vein, I would like to recall that this is the first meeting of the Society that I have ever attended at which Charles Fenwick was not present. I think that those of us who have known and revered Charles for all these years should send him our best wishes. I feel especially sentimental about this, because my introduction to international law was through Charles' book in a course taught at the University of Mississippi in 1923 by the football coach. (He wanted to be a scholar and that was all they would let him teach.)

Perhaps, however, I had best forego the pleasure of talking about the nature of international law and come to my assigned task of making the annual awards for the Society. As Tom Farer remarked earlier, when everybody is equal, nobody is anybody. The Society doesn't have much money and about all we can do is pay our respect and confer recognition, which we do broadside at these Annual Meetings.

The first award is the Certificate of Merit for the best publication in the field of international law. I read the entire citation:

THE FUTURE OF THE INTERNATIONAL LEGAL ORDER, edited by Cyril E. Black and Richard A. Falk, of which Volume IV, *The Structure of the International Environment*, was published during 1972 within the period prescribed by the Regulations of the Society.

Contrast this laconic announcement (from a committee chaired by a Harvard professor) with the kind of citation that you, Judge Dillard, often wrote.

This is a four volume work of extraordinary merit. Despite the fact that I recommended two other books that were turned down, I can say this with great enthusiasm because most of the four volumes were written by my associates and former students. I am reminded of a story about a very distinguished geographer at Yale who was introduced at a banquet of his former students as follows: "There is no need to introduce this distinguished gentleman. I am sure that you have all either read his books or written them."

This is a very fine set of volumes, and we should be proud that they are sought to be honored by the Society.

The second major award is for honorary membership. It goes to:

Dr. Taslim Olawale Elias, Chief Justice of Nigeria, and professor of law and former Dean of the Faculty of Law, University of Lagos, Nigeria, member of the International Law Commission and author of *Africa and the Development of International Law*.

This again is the whole citation from the Committee (also chaired by a Harvard professor). I demanded a few more words and this is what I got:

Dr. Elias has had a distinguished career in many fields, and in recent years has devoted his major attention to several aspects of international law. . . His contribution has been always a positive

one, and his colleagues on the International Law Commission and at the many international conferences in which he took part have testified to his ability, skill and deep knowledge of international law.

I know Dr. Elias, having served as a minion at a large conference over which he presided. He turned out to have a very convenient memory. He could not remember things; he could not understand; he could not hear; he jumbled his words sometimes. But within 24 hours, we discovered that his convenience of memory and confusion were deliberate. He was a tactician, a parliamentarian, a statesman, and a gentleman of the highest order. I would join with this Committee in thinking that the Society does honor to itself in inviting Dr. Elias to become an Honorary Member.

Our next major award is the Francis Déak Prize, contributed by Oceana Publications, for the best student written article appearing in a student international law journal. It goes to Allan R. Pearl for his article "Liberalization of Capital in Japan." As I looked at this, I wondered what on earth the "Liberalization of Capital in Japan" had to do with international law. Then I looked to see in what student journal it had appeared. When I saw that it was the *Havard International Law Journal* I understood. This contribution is from the great sociological center for the study of international law in our country.

We come finally to the awards in which I am most interested—The Philip C. Jessup International Law Moot Court Competition. The award for the best team goes to West Virginia University; the runnerup award to the team from Brunel University in the United Kingdom.

The award for the best oralist in the Competition goes to a young man who is one of the most dexterous I have ever encountered. In the final round this morning, I thought I had him set up for the kill. He walked a tightrope to escape calculated murder and he did it with great grace and intelligence. The award goes to James E. Roark of West Virginia University. For the best oral performance in the international division, the award goes to Mrs. Niloufer Vishnu Bhagwat of the University of Bombay. In the national division it goes to Timothy Noel Smith of California Western.

The award for the best memorial in the international division goes to the University of Utrecht in The Netherlands. The national competition ended in a tie between California Western School of Law and Vanderbilt University. Finally, the Rutgers Trophy for the best memorial in the national regional competitions goes to the team from Washington and Lee University.

This completes all the respect and honor I have been authorized to confer.

Mr. FARER: I can't see Mac without thinking of his great intellectual and philosophical rival, Wolfgang Friedmann. As an old friend of Wolfgang's, I find it impossible to let this dinner go by without saying something about him. Yet I feel that for those of us who knew him, words are clearly inadequate, and for those who did not, they are probably irrelevant. Just as Mac personifies the virtues of American society, so

Wolfgang was a beautiful, refined expression of all that was best in European socialism and European culture. He was more than a personification, of course; he was a unique human being.

The only words which reflect even palely the love and esteem for Wolfgang felt by his many friends were written a long time ago: "His life was gentle, and the elements so mixed in him that nature might stand up and say to all the world 'This was a man'."*

We shall miss him very much.

Mac and Wolfgang have been two of the paladins of international law in the United States. Hardy Dillard has been their companion at that lofty level. If ours is the age which is proud of machines that think and suspicious of men who try to, then I suppose there is ample reason to suspect Judge Dillard. In his person, as in his writings, he felicitously links the worlds of scholarship and government. He has been a professor of law, Dean of the University of Virginia Law School, a consultant on innumerable occasions to various governmental institutions, a former President of this Society. We are delighted to have here, Judge Hardy Dillard.

THE WORLD COURT—AN INSIDE VIEW

Address by Judge Hardy C. Dillard

Mr. Chairman, President Rogers, Professor McDougal, Judge Hackworth, honored guests, ladies and gentlemen: When Steve Schwebel called me up over long distance I was peacefully having supper at the Promenade Hotel in The Hague. He asked me if I would quickly pinch-hit for Manfred Lachs, who had accepted but was laid low by illness. I accepted in a mood of exuberant indiscretion. I did not know then that my good friend, Myres McDougal, would steal most of the time theoretically allocated for what is called the major address of the evening. However, I forgive him because of his gracious allusion to Mrs. Dillard. This is the kind of thing we Southerners indulge in with the grace and respect for the amenities for which we are renowned.¹

I confess that a glance at your program seems to say something to me. What it says is that there will be a speech but at its end we can rejoice with dancing and music.² In a reminiscent mood, it reminded me of something that happened at the University of Virginia some years ago. We had Sir John W. Wheeler-Bennett, the renowned English historian,

* Shakespeare, *Julius Caesar*, Act. V, Scene 5.

¹ Because of the time factor, I did not prepare a written manuscript. Except for some judicious editing I have preserved the less formal presentation revealed by the taped recording. I have also added a few cautionary footnotes.

² The printed program listed the dinner and speech at 7 p.m. followed by Music and Dancing at 10 p.m.

as a visiting professor. He received an invitation from the Richmond Alumni Association of our University, which read:

Dear Sir John W. Wheeler-Bennett:

We are having the Virginia Glee Club on Friday night, and we would like you to accompany them with a speech.

Responding to a gracious introduction is not easy. When Tom Farer was talking my mind traveled back to 1945, when I happened to be giving a speech in China to some English-speaking Chinese officers. I was introduced with all the appropriate flourishes, but what lingers in my memory was the peroration. Turning to me, the Chinese General said: "Finally, sir, we want you to know that our so-great pleasure at having you with us is only marred by the anticipation of what you are going to say."

Tonight, I should like first to share with you certain insights which have come to a quondam professor recently turned baby judge. I want to give you a little feel for the World Court in motion, and finally I shall hazard a few remarks about the future.

Let me begin in an academic vein by saying that I have an unabashed, undiluted love of the law. As a professor, it seemed to me we have by all odds the most intellectually satisfying of all disciplines. We can be as theoretical, as abstract, and as speculative as the philosopher or the political theorist; yet we are always pulled down to earth by the concrete case, the specific provision in a treaty, charter, or constitution. Like Antaeus of old, we gather strength by touching ground.

As a judge, I have come to see that we have an affinity with the historian, because the judge, like the historian, must somehow recapture the events of the past and, to a certain extent, view them through the lenses of the present. Yet we must reach beyond the past event because, as Professor McDougal has told us so many times, and I believe it implicitly, our discipline does require us to be conscious of values, even if we do not express them or make them explicit in our judgments.

Having this view as a professor, I asked myself after a brief three year and a half interlude on the court, has this perspective changed? I hasten to say it has not. Yet I must confess that the roving, thrilling role of the professor is somewhat more liberating than that of a judge. I think a remark, attributed to Lord Denning, states it best in declaring that the difference between a professor and a judge may be put quite simply. It is that a judge must find a solution for every difficulty, whereas a professor must find a difficulty for every solution.

In my former role as a professor I came to the conclusion, now fortified by judicial experience, that our thinking about "law" and "adjudication" may be distorted by four fallacies which, while familiar, may be worth recalling.

The first of these is the fuss fallacy. It consists in the notion that law is only a bundle of restraints imposed on the bad man in order to protect the good man. This facile notion totally ignores the guidance role of law. As H. L. A. Hart has reminded us, law is less concerned with the bad man

than with the puzzled man. If I were to draw on the jurisprudence of our court, I would point to the *North Sea Continental Shelf* cases in which Denmark and the Netherlands and West Germany were genuinely puzzled over their respective rights over the continental shelf in that sea and needed guidance. The Court's judgment provided the principles that enabled the states later to resolve the dispute by negotiation. The Court was here performing a function too little appreciated by those who fear third-party judgment.

The second fallacy is the Koran fallacy, the notion that law is somehow imbedded in a bunch of big fat books, only they are badly indexed and need interpretation. The notion seems to be that without the books, there is no law. International law is said to be full of gaps and uncertainties, and this is frequently used by states as a reason for not having recourse to third-party judgment. It can be called the "leap in the dark" theory. Of course, the fallacy here is that law is an ongoing process, a method of reasoning, and if there are gaps in international law, so likewise in municipal law. The point needs no elaboration.

Linked with this fallacy is the crystal fallacy, the notion that a word is just a crystal, transparent and unchanged, whereas, to use the image made familiar by Holmes, it is the skin of a living thought and may vary greatly in color and content, depending on the time and circumstance in which it is used. Anyone who tries to read the Charter of the United Nations or any other great constitutive document as though he were trying to diagnose the small print in an insurance policy is a ready victim of this fallacy.³

There is also the straitjacket fallacy, the notion that law somehow perpetuates the status quo by imposing a blanket on change. Some of our diplomatic friends have been at pains to emphasize this factor as a reason for restraint in appealing to law. Pound's famous dictum about "stability and change" has found an even more arresting characterization in an essay by Paul Freund. "All history," he wrote, "is a tension between heritage and heresy which law in its groping fashion seeks to mediate."

The extent to which the Court can play a creative role in resolving disputes and shaping the law need not detain us. I freely concede that this age-old problem has a somewhat different dimension in the international arena in contrast to the national. Nevertheless, the very nature of the judicial process permits the possibility of accommodating the need to be stable without standing still. I suggest that, in the jurisprudence of the Court, the *Reparations for Injuries* case illustrates the point.

Finally, there is the fallacy of the false alternative, or what might be called the fallacy of the rigid category—the notion that you have two compartments, a legal dispute here and a political dispute there, and that

³ In my view a banquet speech immunizes the speaker from the need to qualify every generalization as if he were reading a textbook. It is not the appropriate occasion for an analysis of the plain and ordinary meaning canon of interpretation or the many other controversial aspects of the processes of interpretation which bedevil the historian as well as the jurist. I have commented on these matters elsewhere.

these two compartments are separated by a sort of mutual nonaggression treaty. Of course we can erect a paradigm image of a perfect legal question; and a paradigm image of a perfect political question. But just as you rarely have a perfectly good man and a perfectly bad man or a completely happy marriage and a completely miserable marriage, the paradigm image does not get you very far. Just as men are neither a pack of wolves nor a choir of angels, and marriages are sometimes happy and sometimes sad, so with disputes. Most of them, as we all know, have both a political and a legal component. And surely the legal component can usually be syphoned off for analysis.

At the theoretical level it is possible that these four fallacies have had a chilling effect in thinking about the role of third-party judgment. But I do not wish to press the point.

Now, let me turn more specifically to the Court itself, and how it works. I hope in doing so I will not be accused of special pleading or of speaking out of a sense for job security. I shall talk about my initial impressions of the Court when I first came on, and what has happened since.

There is no doubt that the Court has suffered from what is called in the vernacular a bad press. I shall read to you some samples. At the time of the 25th Opening Session of the Court this headline appeared in the *Richmond Times-Dispatch*, "Prestige Ranks High, Influence Low As World Court Opens 25th Session." Three columns of unflattering prose end up with this final paragraph:

The Judgeships are considered prime plums. They pay a tax-free salary. The job is a prestigious, luxurious sinecure which displeases activists like Philip C. Jessup, (who preceded Hardy C. Dillard) but pleases the elderly and infirm who often populate the Court.

Time magazine came out with something similar, as did the *Washington Post*. *Time* stressed the fact that the judges were restless, that they were catching rheumatism in their old headquarters, and that most of them wanted to return to the Riviera where they had villas.

I have many clippings of this kind, all of which were sent to me by what may be best described as quasi-friends.

Reflecting on all of this after three years, I am moved to say that they remind me of a book review I once read. It was very cryptic and to the point. It said: "This book has all of the lyrical qualities of the Manhattan telephone directory, without any of its accuracy."

Take the business about a sinecure. I have talked to Chief Justice Burger and Roger Traynor and Henry Friendly and a lot of my friends on the Council of the American Law Institute. All of these judges have flocks of clerks to help do their work and to bat ideas with, but on the World Court a judge does not even have a private secretary. The Court has a very good registry, but the fact that we are bereft of private secretaries speaks eloquently of the non-sinecure character of the job.

Of course we have a pool of both French and English speaking girls

and, in the curious phraseology of a famous personnel memorandum of a large corporation, we are privileged to "take advantage" of these girls!

Reverting to the unsympathetic press notices, it is necessary to say that they were prompted by the fact that in February of 1970 the Court, having just concluded the *Barcelona Traction* case, found itself without a single additional case on its docket. But in recent years we have had the *Namibia* Advisory Opinion, requested by the Security Council, the India-Pakistan case, which tested the jurisdictional powers of the Council of ICAO, and we are up to our necks in the so-called Cod War between Iceland, West Germany, and the United Kingdom. We have already granted the request by the latter states for interim measures of protection and have decided the jurisdictional issue. We now await the case on the merits.

We are now in the final stages of testing for the first time the review procedures of the United Nations Administrative Tribunal.⁴ Nor is this all. Five members of the Court, of which I am happy to say I am privileged to be one, have been tapped for a very important arbitration involving Chile and Argentina to resolve a dispute that has festered for almost a century, and which focuses on three small islands in what is called the Beagle Channel at the base of the Tierra del Fuego.

I mention all this merely to suggest that some of the concern expressed about the Court and, in particular, about its dearth of litigation, and some of the obituary notices which were sounded about the Court "withering away" do require qualification, if only to redress the balance. I am happy to report this as a message of glad tidings, since it may presage a modest change of attitude on the part of states. Nevertheless the problem remains of generating more business for the Court.

All of you know that the Society has taken this problem very seriously. We have a characteristically thorough and acute article by Professor Leo Gross in the *Journal*. We have the address of Secretary of State Rogers here two years ago. The Society has a panel on the future of the Court. Nor is this intellectual ferment about the Court limited to the United States, as witness the sessions and publications devoted to it by the Max Planck Institute.

It has also been lifted from the scholarly to the political level. As many of you doubtless know, General Assembly Resolution 2723 (XXV), which is focused on the role of the Court in the UN family, has solicited comments from its member states.⁵ More recently, indeed only last month,

⁴ Subsequent to the delivery of this talk this case has been decided and two new, widely publicized, cases have been brought involving requests for interim measures of protection. One by Pakistan against India, involving the threatened transfer of 195 P.O.W.'s to Bangladesh, has been postponed at the request of Pakistan. The Court by a vote of 8 to 6 granted the request by Australia and New Zealand against France in the *Nuclear Test* case. Pending are further proceedings in this case dealing with questions of jurisdiction and admissibility. A request by Fiji to intervene in the above case was also the subject of an Order by the Court. As is well known, Iceland and France have refused to recognize the jurisdiction of the Court and have failed, so far, to appoint agents to appear before the Court.

⁵ This resolution was followed up by Resolution 2818 (XXVI) and the matter has been under consideration by the Sixth Committee.

we have the five Cranston-Taft resolutions before the U.S. Senate. No doubt action on the wide-ranging recommendations of these resolutions is more ardently to be desired than reasonably to be expected and some need critical attention in light of what is politically feasible. Nevertheless they represent, along with the other movements to which I have alluded, a healthy kind of ferment which may, in time, bear fruit.

Missing from all of the comments that I have seen, and missing in all of the literature that I have read, is any understanding of how the Court in fact works. I do not know how interesting this may be, but to me, at least, it is an extraordinarily fascinating and, in my view, relevant subject. To put it crisply, how is it humanly possible for fifteen judges representing the main forms of civilization and chief legal systems of the world, how is it possible for these presumably strong-minded judges, to ever reach such a sufficient consensus to marshal a majority vote and agree on the operative clauses and reasoning necessary to a considered judgment? And I may say incidentally that it would be helpful if members of the bar had a deeper insight into this difficult question with respect to the U.S. Supreme and inferior courts. I do not refer to the deliberations, as such, which are necessarily secret but to the *process* of decisionmaking. With us, this is no secret but, on the contrary, is the object of a published resolution of the Court dealing with its internal judicial process. Before turning to a detailed description of this process, I should like to make four brief preliminary comments. The first is personal. When I first went on the Court, I was inclined to be skeptical but as my insights deepened I did not remain to pray but I did refuse to scoff and began to appreciate the virtues of the system. Second, it is necessary to recall that the procedures of the Court draw on both the common and civil law systems and thus reveal both the strength and weakness which compromises so frequently manifest. Third, as a matter of interest, the Court has a standing committee which scrutinizes not only its Rules but its internal procedures. My predecessor Phil Jessup was a very active member of this important committee and I have inherited, without necessarily filling, his role. Fourth, as some of you know, the Court has recently revised a large number of its Rules with a view, primarily, to expediting its procedures.

I turn now to the main burden of my song. What, in fact, happens when the Court is seized of a case involving a judgment or an advisory opinion? (I put aside requests for interim measures of protection which require a more accelerated procedure.)

First, the atmosphere in the Court is one of hushed solemnity even exceeding that of our Supreme Court. This is partly attributable to the cathedral-like Peace Palace setting with its stained glass windows, vaulted roofs, elaborate chandeliers (in the mode of Versailles) and the like. You may get a "feeling" for it if I digress on a whimsical note told me by Sture Pétren, the Swedish judge on the Court. It is not unusual for a feminine member of the public escaping through the back door, to curtsy to the President of the Court, before her exit. Once during the *Barcelona Traction* case, an English school teacher ventured into the Hall of Justice accompanied by a retinue of little school girls. As

the last one left, she curtsied and then, in keeping with the occasion, she reverently bowed her head and blessed herself!

Our oral hearings seem to go on endlessly. This is so even though we also have elaborate briefs (called Memorials and Counter Memorials) and many pounds of annexes. Every lawyer knows that in the U.S. Supreme Court each counsel is limited to one-half hour unless the case is exceptional in which event an hour may be graciously permitted. The briefs silently carry the major burden. With us there is no limit to either form of persuasion. I believe in the *Barcelona Traction* case there were no fewer than sixty-four "public sittings" each lasting three hours except for a charitably inserted break of twenty minutes. In the *Namibia* case there were, if my memory serves, about twenty-seven. Counsel wear the attire that is customary in arguing before the highest tribunal of their own states—gowns, wigs, or business suits. Their arguments are read and immediately translated into French or English by our efficient Registry and distributed to each judge.⁶ No live exchanges of questions and answers occur. Questions are put in writing and are carefully answered in writing and also orally. They form part of the voluminous record.

The sequel to the oral hearings is a highly structured process involving no less than eleven distinct steps. I shall, even at the risk of being a bit tedious, tick them off.

First, the President will circulate a list of "issues." These are freely discussed and are, in no sense, considered conclusive. Following these so-called deliberations, each judge is on his own with a specific duty. This is to prepare what is called a "Private Note." This represents his view of the case fortified by reasoning and authority. Now I hasten to say that they vary a great deal in thoroughness, analytical precision, and marshaling of authorities. In length they may vary from a dozen to as many as one hundred and fifty pages. These Notes are all translated and distributed to every other judge for study. Interestingly enough they are distributed anonymously, in order, presumably, to minimize the potential influence of one judge on another. After a brief interval, the Court begins the next series of deliberations. This too is structured. Each judge, in inverse order of seniority defends or, more rarely, modifies the point of view elaborated in his Private Note, the authorship of which is, of course, now revealed. I should pause here to say that the lonely preparation of a Private Note may have the tendency, since it is committed to writing, of psychologically freezing the point of view it expresses.⁷ On the other hand, it has the virtue of forcing the judge to

⁶ As is well known the two official languages of the Court are English and French. In its present composition English is used as the chosen language by nine judges and French by six. However a number of judges can use both languages without difficulty.

⁷ I was informed by a senior judge that in his experience it was quite rare for a judge to shift his position once it was written and reinforced by his oral presentation. This is reminiscent of the remark attributed to Justice Brandeis that "Justice Day was incapable of being persuaded by anyone but himself." My own observations lead me to believe that judges are by no means so inflexible and the oral exchanges are capable of producing modifications in the previously expressed point of view. Of course much depends on the individual judge.

study carefully all aspects of the case and to familiarize himself with the truly massive documentation that customarily accompanies the pleadings. The written exposure triggers some sense of pride and some instinct of workmanship that might be lacking if all deliberations were merely informal and oral.

After the oral expositions and discussions are terminated, it becomes fairly clear how the majority is constituted even if there is no agreement among the majority on every point. At this stage a unique procedure is set in motion. By secret ballot a drafting committee is elected with the President of the Court acting as an *ex officio* third member.

The job of a drafting committee is at once tough and unenviable. It is charged with forging a draft capable of marshalling optimum support both with respect to the Operative Clauses and the reasoning in their support. In fact, before the final vote is taken, the committee submits not one but three drafts. The Preliminary Draft is only the beginning and is distributed with a view to eliciting written comments and amendments. Proposed amendments dealing with form, language, and style are relayed directly to the committee; those dealing with substance are translated and distributed to all other judges. Armed with these comments the committee produces a modified draft which is then read out clause by clause in both languages. Comments on this draft are made orally as the reading proceeds. At this point those judges who wish to submit individual or separate opinions are charged with doing so rapidly and to submit them to the committee for consideration. This permits the committee to determine whether any last minute shift may be made that would either accommodate or soften the thrust of such views, or some of them, without destroying the main thrust of the majority opinion. Finally the committee comes up with a Final Draft which is also read out clause by clause in both languages. At the conclusion of this reading, which like its predecessor may take several days, the votes on the Operative Clauses are taken in inverse order of seniority. Judges with individual or dissenting opinions are then accorded a few days to polish up but not substantially alter their opinions.

From this labored recital I hope I may be permitted to draw certain conclusions. First, it reveals how the process itself facilitates the forging of a consensus despite the widely disparate backgrounds of the fifteen judges. Second, it explains why the majority opinion by trying to accommodate many reasons may appear more diffuse and less persuasive than some individual and dissenting opinions which are more sharply focused. Incidentally this raises a peculiar dilemma for a judge who may wish to avoid weakening the majority opinion but may yet wince at some of the reasons advanced in support of it, a problem not, of course, unknown to our Supreme Court, as Bickel's book on the unpublished opinions of Mr. Justice Brandeis reveals.

Third, it must be recalled that cases before the ICJ are more likely to be deeply rooted in history than is true in the national domain and furthermore the Court, except to a very limited extent (as in the ICAO case), is not an appellate court but both a court of first instance and a final court. This means, of course, that it must grapple with basic facts unformed by

the sifting and distilling process which progress through lower courts provides. The structured process helps to lift out for emphasis and discussion those facts deemed most compelling.

Finally, the process may have a deeper significance. We are told that one of the reasons advanced for the reluctance of states to submit disputes to the Court may derive from an unstated fear of a judgment by alien jurists, a reluctance compounded by the notion that international law is highly charged with precarious gaps and large uncertainties (a notion to which I alluded earlier). Perhaps, if the great care and consideration given by the Court to every case and issue, great or small, were better known some of this fear might be diluted. I think Rosalyn Higgins is quite right in her many observations indicating that nationalistic bias plays a relatively minor role, if any, in comparison with the philosophic premises which each judge, consciously or unconsciously, brings to bear in his approach to law and the legal order. In any event the kind of exchange of views required by the Court's process of decisionmaking tends inevitably to dampen, by mutual exposure, the pull of nationalistic and idealistic affinities.

What then of the future? I have no clear answer. One inevitably recalls the wry comment that "prophecy is always dangerous, especially if it involves the future." Furthermore, the history of international adjudication reveals that the problem of third-party adjudication is by no means new. Indeed four centuries ago Erasmus was voicing a lament not unlike that which has concerned this Society and other scholarly associations. "The world," he wrote, "has so many grave and learned bishops. . .so many grey haired grandees wise by long experience. . . why should not the foolish quarrels of princes be settled by the arbitrament of these learned men?"

Many suggestions have been made in response to this inquiry. They need not detain us this evening. Suffice it to remark that the wise approach is not to seek a single ticket pointing the way to a better ordered world or to assume that third-party judgment supplies such a ticket.

In other words law and third-party judgment should be viewed not as isolated phenomena but should be located in the larger context of conflict management with due regard to other peace producing devices. These are, of course, the familiar and frequently difficult techniques of old fashioned diplomacy, as preached by George Kennan and Sir Harold Nicolson, conference diplomacy as at the United Nations, mediation and conciliation.

Each of these has its own peculiar set of virtues and limitations. There are times, no doubt, when a face-saving, negotiated compromise may be better than a face-losing defeat in a law suit; there are times, no doubt, when the nature of the controversy is so deeply entrenched with elements of what Aristotle called "distributive" as opposed to "corrective" justice that adjudication, despite its capacity to syphon off tension ridden issues, is yet not suitable to determine the merits of the controversy; there may be times, too, when the conflict is of such a nature that, while it can be

decided by a court, the decision would not satisfy the grievance which generated the conflict.

Grant all this and there yet remains one virtue which law alone possesses. I refer to its capacity to produce a *sense of order* and in the long run a tolerable degree of predictability. The trouble with all other methods is that they tend to be episodic. They provide only a series of ad hoc solutions abating perhaps immediate tensions without producing the long-range conditions which are more likely to head off tensions by absorbing them within a system.

Only recently I have had occasion to reread the opening and closing chapters of Whitehead's *Science and the Modern World*. He shows how man has a deep-seated urge to search for principles of order; indeed how faith in their existence is one of the great animating forces for intellectual effort.

Surely law and its agents can help to satisfy this urge better than any alternative, provided their role is better recognized and the fears inspired by ignorance are dissipated. Perhaps if we can get this across, bit by bit, the plaintive cry of Erasmus will not only be heard but heeded. If so, then maybe the uses of patient reason and objective judgment will be vindicated and we will be able to meet the uncertainties of the future with a heightened degree of confidence and good will.

APPENDICES

REPORT OF THE COMMITTEE ON PUBLICATIONS OF THE DEPARTMENT OF STATE AND THE UNITED NATIONS IN MEMORIAM

The Committee feels deeply the loss of its loyal member, Arnold Fraleigh, who died on February 13, before this report was prepared. Mr. Fraleigh's contribution over the years to the report of the Committee was consistently thorough, scholarly, and informative, providing to the members of the Society useful and readily accessible information concerning current publications of the Department of State and other government bodies. The standard set by his work will set an example for the rest of us for a very long time to come.

DEPARTMENT OF STATE PUBLICATIONS

Foreign Relations of the United States

Eleven volumes of *Foreign Relations of the United States* have come off the press since our last report a year ago. This establishes an all-time record for publication in one year. Two more volumes are scheduled to be released within a few weeks.

Of special interest among the volumes released during the past year are: 1946, Vols. IX and X which contain the records on the Marshall Mission to China; 1947, Vol. III which records the Marshall Plan for European recovery; and Vol. V which documents the Truman Doctrine regarding Greece and Turkey.

Volumes released since our last report are:

The Conference at Quebec, 1944. (This completes the special series on World War II Conferences.)

1946

IX and X The Far East: China. (This completes the volumes for 1946.)

1947

- II Council of Foreign Ministers; Germany and Austria
- III British Commonwealth, Europe
- IV Eastern Europe, The Soviet Union
- V Near East and Africa
- VI Far East
- VII Far East: China
- VIII American Republics

1948

IX The Western Hemisphere.

*Volumes now in preparation are:**1947*

- I General, United Nations. Scheduled for early release.

1948

- I General, United Nations. In clearance.
- II Germany, Austria. Scheduled for early release.
- III Western Europe. In clearance.
- IV Greece and Turkey, Eastern Europe, Soviet Union. In clearance.
- V Near East, South Asia, and Africa. In clearance.
- VI Far East and Australasia. In clearance.
- VII Far East: China. Indexing.
- VIII Far East: China. In clearance.

1949

- I National Security Affairs, United Nations. In clearance.
- II Foreign Economic Policy, Western Hemisphere. In clearance.
- III Council of Foreign Ministers, Germany, Austria. In clearance.
- IV Western Europe. In clearance.
- V Eastern Europe, Soviet Union. In clearance.
- VI Near East, South Asia, and Africa. Ms. being edited.
- VII Far East and Australasia. In clearance.
- VIII Far East: China. In clearance.
- IX Far East: China. In clearance.

1950

- I National Security Affairs, United Nations. Ms. being edited.
- II Foreign Economic Policy, Western Hemisphere. Ms. being edited.
- III Western Europe. Ms. being edited.
- IV Central and Eastern Europe, Soviet Union. Ms. being edited.
- V Near East, South Asia, and Africa. Ms. in preparation.
- VI East Asia and the Pacific. Ms. being edited.
- VII Korea. In clearance.

1951

- I National Security Affairs, United Nations. Ms. in preparation.
- II Foreign Economic Policy, Western Hemisphere. Ms. in preparation.
- III Economic Security and the German Problem. Ms. in preparation.
- IV Europe. Ms. in preparation.
- V Near East, South Asia, Africa. Ms. in preparation.
- VI East Asia and the Pacific. Ms. in preparation.
- VII Korea. Ms. in preparation.

In our report last year, we quoted the directive of President Nixon dated March 8, 1972* calling for a program to reduce the time lag behind currency in the *Foreign Relations* volumes from 26 years to 20 years within the following three years. While the increase in the number of volumes published and in advance stages of preparation is

* 1972 PROC. AMER. SOC. INT. LAW, 66 AJIL 324 (No. 4) (1972).

encouraging, it is evident that the program called for by the President is faltering badly. If all the volumes now listed in preparation are published within two years, a very optimistic estimate, the volumes for 1951 will be coming out in 1975, still 24 years behind currency.

A prime cause of delay lies in getting clearance for publication not only within the Department of State but within other agencies, and for previously unpublished documents originating within foreign governments for clearance with the government of origin. Foreign clearance, however, does not seem to have been a major source of delay in recent years.

A list of *Foreign Relations* volumes in preparation printed in our report of last year showed eight volumes "in clearance."* The list this year shows that only one of those volumes was cleared during the past year, and five of those were in clearance two years ago. Seven additional volumes are now in clearance for a total of fourteen.

The greatest delay, apparently, comes from outside the Department of State. The directive of March 8, 1972 by President Nixon to the Secretary of State was repeated to the Secretary of Defense, the Director of Central Intelligence, and the Assistant to the President for National Security Affairs with instructions to cooperate fully in carrying out the program "to the maximum extent consistent with the requirements of national security."

It seems hard to escape the conclusion that some responsible officers do not take a directive by the President very seriously.

The *Foreign Relations* Division of the Historical Office seems to have compiled at least a year's record within a year, perhaps with some gain. The outlook for the future is better. Six new appointments to the staff have been made within the past year, but two of these are replacements for retired members, so the net gain is four, increasing the staff from fourteen to eighteen. In view of the tight Department of State budget, this is an encouraging gain, but certainly not sufficient for a crash program such as would be involved in rapidly closing the publication gap to within 20 years behind currency.

The Committee reports with regret the retirement of S. Everett Gleason as Chief of the *Foreign Relations* Division. His successor is Fredrick Aandahl. This Division also lost last year by retirement Rogers P. Churchill who, since 1946, had been the Division's authority on the Soviet Union and Eastern Europe.

United States Foreign Policy 1972. The Secretary of State's review for the Congress of the implementation of United States foreign policy in 1972 was scheduled for release in April, 1973, but was not yet available at the time of writing of this report.

U.S. Participation in the U.N. (Pub. 8675). The President's 25th annual report to the Congress on United States participation in the United Nations was released in September, 1972 and covers the calendar year

* *Ibid.*, 326.

1971. The report was also issued as House Document 92-297. It is divided into parts dealing with (1) maintenance of peace and security, (2) economic, social, and humanitarian developments, (3) trusteeship and dependent areas, (4) legal developments, and (5) budget and administration. The report includes, *inter alia*, a review of the General Assembly decision to seat the representatives of the People's Republic of China and corresponding action in the Security Council, along with the decision to deprive the Republic of China of representation; the establishment by the UN of a Fund for Drug Abuse Control; the endorsement by the General Assembly of the Convention on International Liability for Damage Caused by Space Objects and the Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; the election of a new Secretary-General; the Assembly's decision to adopt and submit to member states for ratification an amendment to the Charter to double the membership of the Economic and Social Council; and the creation of the position of Disaster Relief Coordinator within the Secretariat. The report also details lack of progress in matters of finance, the organization and conduct of peacekeeping missions, and the General Assembly effort to rationalize its organization and procedures.

United States Contributions to International Organizations. The Secretary of State's 20th annual report to the Congress on U.S. contributions to international organizations was published as House Document 92-377 and transmitted to the House Speaker on November 7, 1972. The report, which covers contributions for the fiscal year 1971, provides details on the \$401 million contributed by the United States to international organizations during that period. The total includes assessed contributions of \$145 million to 54 organizations and voluntary contributions of \$256 million to 24 special programs in support of economic development and humanitarian activities as well as support for the Cyprus peacekeeping operation. The report deals only with contributions to multilateral organizations (intergovernmental bodies with three or more members). Bilateral organizations are not covered. Contributions to the international financial institutions are detailed in a separate report to the Congress by the National Advisory Council on International Monetary and Financial Policies, Department of the Treasury.

Whiteman's Digest of International Law. The fourteen substantive volumes have all been published, and Volume 15, the Index, will be released by the Government Printing Office in May, 1973.

*Digest of United States Practice in International Law 1973.** The Department of State has decided to publish henceforth an annual volume detailing U.S. practice in international law. The first annual digest, which will cover the calendar year 1973, is currently being prepared and is expected to be published in the spring of 1974. The annual

* See Arthur W. Rovine, *U.S. International Law Digests—Some History and a New Approach*, 67 AJIL 314 (1973).

volumes will include only U.S. practice. The Department is also considering the publication of a cumulative, multi-volume U.S. practice digest after perhaps ten or fifteen years. The cumulative work would draw heavily on the annual digests.

Treaties and Other International Acts Series (TIAS). The TIAS series, which provides the texts of treaties and agreements in pamphlet form, reached No. 7541 by the end of 1972, an addition of 277 titles since the end of 1971. Pursuant to Public Law 89-497, approved July 8, 1966 (80 Stat. 271; 1 U.S.C. 113), the TIAS pamphlets are "competent evidence" of U.S. treaties and agreements in all courts of law and equity and of maritime jurisdiction, and in all tribunals and public offices of the United States and the several States, "without any further proof or authentication thereof." The TIAS pamphlets provide the text of treaties and agreements in whatever languages they were signed, along with the dates of signing, ratification, proclamation, and entry into force. Current information on the publication of titles in this series is provided in the weekly issues of the Department of State *Bulletin*.

United States Treaties and Other International Agreements. Volume 22, published in two parts in 1972, includes the texts of all agreements for the year 1971. Each year's volumes are a collection of the TIAS pamphlets, in numerical order, for that year.

Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 1973 (Pub. 8697). The 1973 edition was published on March 13, 1973. Compiled by the Treaty Affairs Staff of the Office of the Legal Adviser, Department of State, *Treaties in Force* is arranged in two parts and an appendix. The first section includes a listing of all bilateral treaties and other agreements listed by country or other political entity, with subject headings under each country or entity. The information provided is the title of the treaty or agreement, dates and locations of signing, entry into force date, and official citations, in most cases to the TIAS and UST series. The second section lists multilateral treaties and agreements, arranged by subject matter and indicating all states parties to each treaty or agreement. Signing and entry into force data, as well as official citations to the texts, are also included. The Appendix provides a listing of proclamations, treaties, and conventions establishing copyright relations between the United States and other countries. Current treaty actions are reported in the weekly issues of the Department of State *Bulletin* and in the bimonthly issues of *International Legal Materials*.

Treaties and Other International Agreements of the United States of America 1776-1949 (Pubs. 8615 and 8642). Volumes 9 and 10 were released since our last report. Compiled under the direction of Charles I. Bevans, Assistant Legal Adviser for Treaty Affairs in the Department of State, this series constitutes a complete chronological list of agreements entered into by the United States during the years from 1776 to the end of 1949, when the compilation of the TIAS pamphlets and *United States Treaties and Other International Agreements* was begun. The first four volumes of the Bevans series contain the texts of multilateral

agreements; the subsequent volumes include bilateral agreements arranged by country alphabetically. Volume 9 includes agreements with countries from Iraq to Muscat, and Volume 10 covers Nepal through Peru.

The Battle Act Report 1971 (Pub. 8641). The Secretary of State transmitted to the Congress on May 1, 1972, the 24th report on operations under the Mutual Defense Assistance Control Act of 1951 (Battle Act). The report contains a general review of efforts during 1971 to liberalize the exercise of trade control regulations and to increase opportunities for peaceful trade with Communist areas. This includes the announcement on April 14, 1971 by the President of the end of the 21-year embargo on trade with the People's Republic of China. The report also contains a chapter on trends in East-West trade, and a further section describing U.S. legal regulations that affect trade with Communist countries, U.S. Government activities, and private trade and financial relations. Appendices include the text of the Battle Act, the Battle Act lists, trade controls of the COCOM countries, and statistical tables.

World Strength of the Communist Party Organizations (Pub. 8658). The 1972 edition, being the 24th annual report of the Bureau of Intelligence and Research, was released in June, 1972. The report presents estimates of the strength of the Communist movement throughout the world, excluding the United States, and is based on sources and data through December, 1971. A country-by-country analysis is preceded by a checklist providing certain basic information, including the estimated or claimed number of Communist party members, the legal status of the party, and the position taken by the party or parties in the Sino-Soviet dispute. The country analyses give information on party membership and on voting and parliamentary strength, as well as a brief review of each Communist party within its domestic setting. Mr. Ray S. Cline, the Director of Intelligence and Research, says in an introductory memorandum for the Secretary of State that "Our survey once again sheds light on the two major problems confronting the Communist movement: the growing stagnation of many of the nonruling Communist parties; and the deep cleavage between Moscow and those Communist parties, ruling and nonruling, which continue to resist Moscow's perennial quest for hegemony in the movement."

Issues: No 4—People's Republic of China (Pub. 8666), released in October, 1972, replaces an earlier version, published in December, 1969. It is a very brief (44 pp.) review of contemporary China, including material on the country's geography, economics, food and population, politics, foreign policy, and relations with the United States. Of interest are an appendix containing a chronology of the President's February, 1972 visit to China, and a set of maps depicting China's population, industry, agriculture, and administrative divisions.

News Release of the Bureau of Public Affairs (January 24, 1973) contains the texts of documents relating to the Vietnam agreement, including President Nixon's address to the Nation; Press Conference of January 24 of Henry A. Kissinger; Agreement on Ending the War

and Restoring Peace in Vietnam; the four protocols to the Agreements; and three Fact Sheets (Basic Elements of Vietnam Agreement; International Commission of Control and Supervision; and Four Party Joint Military Commission).

Stockholm and Beyond (Pub. 8657) is the report of the Secretary of State's Advisory Committee on the 1972 United Nations Conference on the Human Environment. It was transmitted to the Secretary by Senator Howard H. Baker, Jr., of Tennessee, Chairman of the Advisory Committee, on April 27, 1972. The report consists of the Committee's final recommendations to the U.S. Government prior to the Stockholm Conference in June, 1972. There are separate chapters on each of the several agenda items, including human settlements, resource management, pollutants, education, development, and institutional arrangements. The papers in the document are expressions of opinion by the drafters, and do not necessarily represent U.S. Government policy. Chairman Baker emphasized, in his transmittal letter to the Secretary of State, the precedent value of the Department's decision to release draft conventions and draft U.S. positions for public scrutiny prior to their being tabled in an international forum.

Trust Territory of the Pacific Islands (Pub. 8520). This 335-page document is the 24th annual report, covering fiscal year 1971, by the United States to the United Nations on the administration of the Trust Territory of the Pacific Islands. (International Organization and Conference Series 91.)

The Search for New World Monetary Arrangements (Pub. 8684). This pamphlet in the Department's *Current Foreign Policy* series includes statements by President Nixon on September 25, 1972, and by Secretary of the Treasury George P. Shultz on September 26, 1972, at the annual meeting of the Boards of Governors of the IMF, IBRD, IFC, and IDA.

President Nixon's Visit to Poland (Pub. 8667). This 13-page pamphlet contains excerpts of President Nixon's remarks and those of Polish leaders, highlights of the joint communiqué issued at the conclusion of the President's visit June 1, 1972, Secretary of State Rogers' statement of May 31, 1972 on the signing of the Consular Convention, and a profile on Poland.

Far Horizons is the quarterly newsletter of the Under Secretaries Committee, Subcommittee on Foreign Affairs Research (USC/FAR), published by the Office of External Research in the Department of State. Among the items in the most recent issue, which is Volume V, No. 4 (Autumn 1972), are articles on the Second Consolidated Plan for Foreign Affairs Research by the USC/FAR, on how the Agency for International Development uses external research in its foreign assistance programs, and on the National Endowment for the Humanities grants for fiscal year 1972.

Background Notes are brief reviews giving factual summaries of the people, history, government, economy, and foreign relations of almost every country and territory in the world. To date the only exceptions are the United States, Monaco, and Vatican City. Each survey also

contains a map, a list of principal government officials and U.S. diplomatic and consular officers, and a reading list.

PUBLICATIONS OF THE ARMS CONTROL AND DISARMAMENT AGENCY

Documents on Disarmament 1971 (ACDA Pub. 66). This compilation of 993 pages (including an index) is the latest in a series of volumes issued annually since 1960 containing basic documents on arms control and disarmament developments during the calendar year 1971. The volume includes many presentations to the Conference of the Committee on Disarmament (CCD), IAEA and NATO documents, important statements from the Soviet Union and the People's Republic of China, statements to the SALT talks and to the United Nations, the texts of the 1971 Accidents and "Hot Line" Agreements as well as the 1971 Seabed Arms Control Treaty, important internal United States statements, and two communiqués of the Warsaw Pact Foreign Ministers.

World Military Expenditures 1971 (ACDA Pub. 65). This 58-page document, prepared in July, 1972, is the sixth annual review by ACDA on world military expenditures. It includes an introductory summary analysis, followed by a series of statistical tables depicting total military expenditures, per capita military expenditures, gross national product, military expenditures as a percentage of GNP, population, armed forces, public education expenditures, and foreign economic aid, and a military and economic ranking of countries. Most of the tabulations provide data for the years 1961 to 1970. All figures for 1971 are estimates.

Arms Control and Disarmament Agreements 1959-1972 (ACDA Pub. 62). This booklet, released in June, 1972, provides the texts and the status of twelve agreements reached during the years covered. These include the Antarctic Treaty, the "Hot Line" Agreement, the Limited Test Ban Treaty, the Outer Space Treaty, the Treaty for the Prohibition of Nuclear Weapons in Latin America, the Non-Proliferation Treaty, the Seabed Arms Control Treaty, the Accidents Agreement, the "Hot Line" Modernization Agreement, the Biological Weapons Convention, the SALT ABM Treaty, and the SALT Interim Agreement.

Arms Control & Disarmament. As of the writing of this report, the most recent issue of the quarterly bibliography with abstracts and annotations is Volume 9, No. 1 (Winter 1973), covering items published through the summer of 1972. The contents are grouped into several subject areas, including the international political and strategic environment, institutions and means for the maintenance of peace (international law, organization, and peace and security forces), a general discussion of arms control, and specific problems and measures of arms control. A notice on the Winter 1973 issue says that because funds will no longer be available, the periodical will cease publication with the Spring 1973 issue (Volume 9, Number 2). The bibliography has been prepared by the Arms Control and Disarmament Bibliography Section of the Library of Congress, through the support of ACDA.

UN DOCUMENTS

In General

The problem of how to make known UN documents of legal significance still remains. Scholars, interested organizations, and even governments have difficulty keeping informed of current developments. The large volume of documentation is part of the reason. Another cause is failure of information on even the most significant actions to filter out of UN circles.

The information jam can restrict the rate of conformity with international standards. One government recently asserted that the situation is improving. Belgium noted that:

[o]wing to improved information, at every level, concerning the major objectives being pursued on the international level, there is a growing tendency to be guided by the principles laid down in United Nations instruments or other European treaties in drafting national legislation. An example of this may be found in a bill on Belgian nationality, which was submitted on 3 March 1971 and which reproduces the main principles contained in the United Nations Convention of 30 August 1961 on the Reduction of Statelessness. It also applies the principles of the United Nations Convention of 29 January 1957 on the Nationality of Married Women.*

Prompt application of UN standards was also made by a Federal Judge in the United States. According to the June 1972 issue of *Social Development Newsletter* at 15-16:

less than four months after the Declaration [on the Rights of the Mentally Retarded] was adopted by the General Assembly the Declaration had an important effect in one country in determining a significant court decision with regard to the lives of thousands of its mentally retarded citizens. The Social Development Division has been informed that in the United States, Judge Frank M. Johnson, Jr. referring to the Declaration, ruled for "the first time in any court, that persons deprived of their liberty and committed to institutions because they were mentally ill or mentally retarded, had a constitutional right to adequate treatment." He based his ruling, *inter alia*, on article 2 of the Declaration which states "the mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential."

As a consequence, the United States District Court, Middle District of Alabama, defined the minimum standard for the operation of state institutions for mentally ill and retarded in a landmark decision, *Wyatt v. Stickney* of 13 April 1972. Moreover these institutions will have to implement a set of guidelines set out by Judge Johnson within six months. As a further safeguard, "human rights committees" each including a patient-member, have been appointed

* E/CN.4/1098/Add.7, at 2.

at the three institutions to ensure that "the dignity and human rights of patients are preserved . . . [and to] advise and assist patients who allege that their legal rights have been infringed."

Normative Texts: Publications on UN Law-Making

The United Nations Commission on International Trade Law (UNCITRAL) is continuing its effective work on the unification and harmonization of international trade law. The work is concentrated in four priority fields: (1) international sale of goods; (2) international payments (with special emphasis on uniform rules for negotiable instruments); (3) international commercial arbitration; and (4) international legislation on shipping.

The work of the fifth session of UNCITRAL (April 10–May 5, 1972) is described in its report (A/8717), and is summarized in the Secretary-General's Report on the Work of the Organization for the year ending June 15, 1972 (A/8701 at Part Four, Ch. III). On the basis of the Sixth (Legal) Committee's report on the UNCITRAL session (A/8896), the General Assembly adopted two resolutions. The first resolution, in addition to encouraging UNCITRAL to continue its work on the priority topics listed above, invited it to consider what steps would be appropriate in regard to the legal problems presented by different kinds of multinational enterprises (A/RES/2928(XXVII), para. 5). By the second resolution (A/RES/2929(XXVII), para. 2), the General Assembly decided to convene a United Nations Conference on Prescription (Limitation) in the International Sale of Goods to take action on an UNCITRAL draft convention on that subject which was approved by UNCITRAL at its fifth session. The sixth session of UNCITRAL convened on April 2, 1973; the draft report on the session will appear in final form as A/9017.

The detailed preparatory and drafting work of UNCITRAL is done in Working Groups which meet between the annual sessions. The Working Group on the International Sale of Goods is engaged in revising the 1964 Uniform Law on the International Sale of Goods (ULIS) in order to prepare a text that could be more widely accepted. The Working Group, at its fourth session (January 1973), reached agreement on a simplified and unified remedial system for ULIS; the report on the session, including a study by the Secretary-General on the subject, appears as A/CN.9/75. General conditions of sale is also a current topic of work of UNCITRAL; a report of the Secretary-General on the feasibility of preparing general conditions applicable to a wide scope of commodities can be found in A/CN.9/78. The draft convention on Prescription (Limitation) in the International Sale of Goods, with a detailed Commentary, (A/CN.9/73) has been circulated to governments and interested international organizations for their comments.

In the field of international payments, the Working Group on International Negotiable Instruments has commenced consideration of a draft Uniform Law on International Bills of Exchange and International Promissory Notes, which was prepared by the Secretariat in consultation with international banking and trade organizations (text and commentary,

A/CN.9/WG.IV/WP.2). A report of the Working Group on the work of its first session can be found in A/CN.9/77. A note by the Secretary-General on the revision of the 1962 text of the Uniform Customs and Practice for Documentary Credits, drawn up by the International Chamber of Commerce, can be found in A/CN.9/L.23.

At its fifth session, UNCITRAL received the final report of its Special Rapporteur on international commercial arbitration (A/CN.9/64). A report by the Secretary-General (A/CN.9/79) analyzed comments by governments on the proposals contained therein, and made suggestions for further work in the field.

The Working Group on International Legislation on Shipping is engaged in revising the rules on the responsibility of ocean carriers for cargo, as embodied in the Brussels Convention of 1924 (the "Hague Rules") and the 1968 Brussels Protocol. The report of its fourth session (February 1973) appears as A/CN.9/76 and as A/CN.9/76/Add.1 (study by the Secretary-General). The main items of the convention and protocol given consideration were (1) unit limitation of liability; (2) transshipment; (3) deviation; and (4) period of limitation.

Volume III of the UNCITRAL *Yearbook* includes the studies and reports considered by the Commission at its fifth session (Sales No. E.73.V.6). Volume II of the Register of Texts of Conventions and Other Instruments concerning International Trade Law (Sales No. E.73.V.3), completing this series of Registers, sets forth the texts of conventions, and information on ratification, in the two remaining priority fields of the Commission's work: international commercial arbitration and international legislation on shipping.

Other UNCITRAL documents include: a Proposal by the French Delegation for the Establishment of a Union for *Jus Commune* in Matters of International Trade Law (A/CN.9/60) and a Report of the Secretary-General containing an analysis of comments by governments on that proposal (A/CN.9/81); Training and Assistance in the Field of International Trade Law (A/CN.9/80); Note by the Secretary-General on Multinational Enterprises (A/CN.9/83) (see also above reference to A/RES/2928(XXVII), para. 5); and Current Activities of International Organizations related to the Harmonization and Unification of International Trade Law (A/CN.9/82).

Other Normative Texts

The International Law Commission, at its ten-week session ending July 7, 1972, produced a set of draft articles dealing with offenses committed against diplomats, and a first draft of articles setting out rules to govern the succession of states in respect of treaties. The twelve draft articles on offenses against diplomats, which went before the General Assembly later in 1972, seek to ensure that safe havens will no longer be available to persons believed to have committed serious offenses against internationally protected persons. The 31 provisional draft articles on succession of states in regard to treaties, which were to be sent

to members for comments before being taken up again by the Commission in 1973, deal with the question of how far treaties previously concluded and applicable with respect to a given territory might still be applicable after a change in sovereignty over that territory, such as occurs when a new state comes into being.

The General Assembly in resolution 2926 (XXVII) of December 1972 *inter alia* invited governments, specialized agencies, and interested intergovernmental organizations to comment on the Commission's draft articles concerning "prevention and punishment of crimes against diplomatic agents and other internationally protected persons."

The provisional agenda (A/CN.4/265) for the Commission's May-July 1973 session includes items on state responsibility; succession of states in respect of matters other than treaties; the question of treaties concluded between states and international organizations or between two or more international organizations; review of the Commission's long-term program of work: *Survey of International Law* prepared by the Secretary-General (A/CN.4/245), priority to be given to the topic of the law of the non-navigational uses of international watercourses (para. 5 of section I of General Assembly resolutions 2780 (XXVI) and 2926 (XXVII)); and the most-favored-nation clause.

UN Document A/AC.138/80 contains the text of the Declaration of Santo Domingo, approved in June 1972 at a Specialized Conference of Caribbean Countries on Problems of the Sea. The Declaration deals with the territorial sea, continental shelf, the international seabed, the high seas, marine pollution and regional cooperation, as well as with the "patrimonial sea" adjacent to the territorial sea. The breadth of the patrimonial sea

. . . should be the subject of an international agreement, preferably of a worldwide scope. The whole of the area of both the territorial sea and the patrimonial sea, taking into account geographic circumstances, should not exceed a maximum of 200 nautical miles. (*Id.* at 4.)

The 57th International Labor Conference in June 1972 created policy guidelines which embody the first comprehensive international attempt to temper the adverse social effects of technology. A draft convention and recommendation concerning dock-workers were approved. After final adoption at the 1973 Conference, these will provide guidance for labor policy on the docks, which are undergoing far-reaching technical change. Another draft convention and recommendation designed to abolish child labor were approved, and will also come before the 1973 Conference for final decision.

Document A/AC.105/109 contains the text of UNESCO's Declaration of Guiding Principles on the Use of Satellite Broadcasting for the Free Flow of Information, the Spread of Education and Greater Cultural Exchange. The Declaration, adopted by the 18th session of the General Conference of UNESCO, October-November 1972, includes the following:

Article I.

The use of Outer Space being governed by international law, the development of satellite broadcasting shall be guided by the principles and rules of international law, in particular the Charter of the United Nations and the Outer Space Treaty.

Article II.

1. Satellite broadcasting shall respect the sovereignty and equality of all States.
2. Satellite broadcasting shall be apolitical and conducted with due regard for the rights of individual persons and non-governmental entities, as recognized by States and international law.

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Article IX.

1. In order to further the objectives set out in the preceding articles, it is necessary that States, taking into account the principle of freedom of information, reach or promote prior agreements concerning direct satellite broadcasting to the population of countries other than the country of origin of the transmission.
2. With respect to commercial advertising, its transmission shall be subject to specific agreement between the originating and receiving countries.

Article X.

In the preparation of programmes for direct broadcasting to other countries, account shall be taken of differences in the national laws of the countries of reception.

Article XI.

The principles of this Declaration shall be applied with due regard for human rights and fundamental freedoms.

In February 1973 a working group began work on a draft charter on the economic rights and duties of states. The group was established by the third session of the UN Conference on Trade and Development (UNCTAD) in May 1972 at the suggestion of Mexico, which also proposed that the charter should include the following principles:

—All states have the sovereign right freely to adopt the social and economic system of their choice. They have the sovereign right to establish laws governing ownership of property in the light of public interest.

—States should refrain from exerting pressure by means of economic measures.

—Every state has the right freely to dispose of its natural resources. The participation of foreign capital should be adapted to the economic objectives of the recipient countries and should be in line with national decisions and priorities.

—No state should be obliged to grant foreign nationals guarantees superior to those granted to its own nationals. Nationalization or expropriation should be justified by motives of public utility. If the question of compensation gives rise to a dispute, it should be settled by the courts of the country concerned.

—The developed countries should accord preferential treatment to developing countries on the basis of non-reciprocity and non-discrimination.

—They should eliminate tariffs or other barriers to the trade and consumption of products of particular interest to developing countries.

—They should adopt measures to compensate for the effects of substitutes for raw materials.

—They should abolish subsidies for the production of primary commodities competing with essential exports from developing countries.

The General Assembly in resolution 3028(XXVII) of December 1972 requested the Commission on Social Development to consider the question of convening a United Nations conference for an international convention on adoption law and to make recommendations for the preparation of a report to the Assembly in 1974 that would deal with (a) policies, programs, and comparative law concerning the protection of children for adoption and foster placement; and (b) comments on the question of sponsoring an international conference for elaborating an international convention on adoption law.

A note by the Secretary-General on the subject (E/CN.5/491) points out that the question of adoption has been on the Commission's work program since the former Bureau of Social Affairs issued a 1956 study entitled *Comparative Analysis of Adoption Laws*, as part of a series of reports on children deprived of normal home life. Since then, however, no studies on adoption law have been undertaken by the Social Development Division. The Commission in March 1973 recommended that the Secretary-General (1) obtain the views of governments on the question of an international conference on adoption law as well as current information on their policies, programs, and laws for the protection of children for adoption and foster placement, and (2) up-date the study.

Recurrent publications

A new periodical entitled *UNHCR* has made its appearance, presenting in appealing format the various activities of the High Commissioner

for Refugees. Issue No. 3, dated December 1972, touches at page 2 on the issue of who cares for refugees who do not meet the test imposed by international legislation of having left their own countries: "Church agencies are also conducting major programmes for uprooted people who do not come within the UNHCR mandate—for example the displaced persons in Vietnam . . ." A Supplement to issue No. 3 seems to indicate how the High Commissioner's own office can help such persons. The Supplement describes his work in the Sudan on behalf of ". . . half a million persons who had been displaced within the country during the conflict." The General Assembly gave its approval of this broadened scope in resolution 2958(XXVII) adopted unanimously on December 19, 1972, when it commended the Commissioner ". . . for his efficient role in the co-ordination of relief and resettlement operations for refugees and other displaced persons . . ." The new publication documents the practical usefulness of this precedent.

The content of the *UN Juridical Yearbook* has been reviewed by the General Assembly. Resolution 3006(XXVII) established a format omitting the legal documents index, which occupied 39 pages in the 1970 Yearbook, published late in 1972. (ST/LEG/SER.C/8, Sales No. E.72.V.1). Another change is that chapter III, formerly styled "Selected decisions, recommendations and reports of a legal character by the United Nations and related intergovernmental organizations," is now to be called simply "Legal activities of the United Nations and related intergovernmental organizations."

The legal documents index as found in the 1968 Yearbook had been criticized in a Joint Inspection Unit Report (A/8362 at 26) which said that it

. . . does not identify the legal questions involved, and covers so many subjects that the reader is left with the impression that almost everything the United Nations does is of "legal interest." It is difficult to visualize who would use this index in preference to the regular United Nations Documents Index.

It is unfortunate that the Joint Inspection Unit simply could not believe that so much of what the United Nations does *is* of legal interest. It should have seen this as a reason for keeping the index, not for abolishing it. As to the use of the index, evidently the Unit was not visualizing teachers and practitioners of law who need a means of keeping up on developments in their field. It is one thing to search the UN Documents Index for subjects already known to be under UN scrutiny. It is quite another thing to be uncertain what subjects are under such scrutiny and to want a way of keeping *au courant*. For the latter purpose, the legal documents index of the *UN Juridical Yearbook* is useful. As a test of its usefulness, let any reader hereof ask himself honestly by what other means he or she would become aware of the very existence of the following resources referred to in the 1968 *Juridical Yearbook* legal documents index: the arbitration rules of the UN Economic Commission for Europe (ECE/625/Rev. 1); the UNCTAD Secretariat report on bills

of lading (TD/B/C.4/ISL 6); FAO Legislation Branch Background Paper No. 1, on the law of international water resources; ALINORM 70/30-32 and 43, on food standards and legislation in Africa, Asia, and Latin America, prepared by the Secretariat of the Codex Alimentarius Commission; FAO Legislative Series No. 9, on foreign investment laws and agriculture; the 1970 UNESCO Convention on prohibiting and preventing illicit import, export, and transfer of ownership of cultural property; UNESCO documents on possible international regulation of the photographic reproduction of copyrighted works, as well as a comparative study on "Author's Basic Rights" of reproduction, broadcasting, and public performance; and Volume I of the World Bank's History of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

A Joint Inspection Unit proposal which is not likely to be followed concerned the periodic reports on human rights. The Unit had recommended in 1971 that the government reports be treated as "conference room papers," *i.e.*, documents available only to those attending the particular meeting. The *Ad Hoc* Committee on Periodic Reports of the Commission on Human Rights rejected this notion. In the Committee's discussion,

[i]t was pointed out that the present reporting system was the best available means for following national developments in the field of human rights, at least until the coming into force of the International Covenants on Human Rights. It was also emphasized that although the periodic reports might not be widely used at present, their importance as future reference documents should be borne in mind Different opinions were voiced with regard to the necessity for the analytical summaries and the subject and country indices prepared by the Secretary-General under the present system. Some members of the Committee expressed doubts about the need for these documents. It was nevertheless recalled that both the Commission on Human Rights and the *Ad Hoc* Committee on Periodic Reports had found these documents valuable in the fulfilment of their respective tasks. The majority of the members of the Committee did not, therefore, consider it timely to recommend that they be dispensed with (E/CN.4/1104, at 5).

The same Committee recommended that

[c]onsideration should be given to reproducing in the *Yearbook on Human Rights* the section of the *United Nations Yearbook* dealing with human rights, as well as measures adopted by the United Nations to promote human rights and combat gross violations thereof in order to make the *Yearbook on Human Rights* more comprehensive (*Id.* at 8).

Comprehensive it would be, but duplicative as well; a simple cross reference should suffice.

Volume II of the 1970 *Yearbook of the International Law Commission* appeared in August 1972 (A/CN.4/SER.A/1970/Add.1, Sales No. E.71.V.7, 317 pp.) containing documents of the 22nd session. The month

before saw the appearance of Volume I of the 1971 *Yearbook* (A/CN.4/SER.A/1971, Sales No. E.72. V.5, 397 pp.).

Volume III (Sales No. E.72. V.3, 254 pp.) of Supplement No. 3 to the *Repertory of Practice of United Nations Organs*, covering Articles 73-91 of the Charter, was published in January 1973, nearly a year after Volume II (Articles 23-72). Volume I (Sales No. E.72. V.2, 459 pp.) of Supplement No. 3 (Articles 1-22) was published in February 1973. The General Assembly's 1972 resolutions are indexed by subject in Press Release GA/4719/Add.1. The Assembly's 1946-1970 resolutions are indexed in ST/LIB/SER.H/1, Parts I and II.

A list of informational publications compiled by the Publications Committee of the OPI/NGO Executive Committee includes the following titles of legal interest: *Human Rights Bulletin** and *Status of Women*, both bi-annual; *Natural Resources Forum*, an annual containing articles on legal as well as other aspects; *Notes and Documents* on apartheid,** approximately monthly; *Objective: Justice*, a quarterly on UN activity against racial discrimination and colonialism; and *Panorama*, issued bimonthly by ILO. Vol. 4, No. 3 of UNITAR *News* contains an explanation of UN documents symbols.

Legal Studies

Only a selection of the last year's UN legal studies are included in the following enumeration: "Insurance Legislation and Supervision in Developing Countries," (TD/B/393 and Corr.1 and Add.1, Sales No. E.72. II. D. 4, 138 pp.); "Taxation of Private Investments in Developing Countries by the Federal Republic of Germany," (ST/ECA/164, Sales No. E.72. XVI. 3, 45 pp.); "Restrictive Business Practices—The Operations of Multinational United States Enterprises in Developing Countries—Their Role in Trade and Development," (TD/B/399, Sales No. E.72. II. D. 16, 30 pp.); "Study of the Privileges and Immunities, Status and Facilities Accorded to Representatives and Secretariat Staff at United Nations Headquarters and at Other Major Duty Stations," (A/AC.154/L.25, 45 pp.); "Drug Abuse and Criminality" (E/AC.57/4, 40 pp.); "Human Rights in the Administration of Justice," (E/AC.57, 17 pp.); "Tax Treaties Between Developed and Developing Countries—Third Report," (ST/ECA/166, Sales No. E.72. XVI. 4, 147 pp.); and "Urban Land Policies and Land-Use Control Measures," Volumes I, II and III (Africa, Asia and the Far East, and Latin America, respectively, Sales Nos. E.73. IV. 5, 6 and 8).

The laws of war are now under continuing study at the United Nations. A report (A/8803) by a Group of Consultant Experts on "Napalm and Other Incendiary Weapons" was prepared under General Assembly resolution 2852 (XXVI) of 1971. A striking summary was

* Issue No. 7, dated July 1972, contained a selective list of UN, ILO, and UNESCO documents and publications.

** Issued by the Unit on Apartheid, whose publications are listed in No. 26/72 of December 1972.

printed early in 1973 under the title *The Fires of War* (OPI/488-01470). A Secretariat report (E/CN.4/1118, 72 pp.) summarized government responses on the question of conscientious objection to military service.

The studies prepared for the February-April session of the UN Commission on Human Rights included a 68-page review of studies of problems of race relations and of the creation and maintenance of racial attitudes (E/CN.4/1105); a much longer study by Special Rapporteur Manouchehr Ganji on the realization of economic, social, and cultural rights (E/CN.4/1108 and Add. 1-7); and a summary of a UNESCO survey of the teaching of human rights in universities and the development of an independent scientific discipline of human rights, (E/CN.4/1119).

April 10, 1972

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ASSOCIATION OF STUDENT INTERNATIONAL LAW SOCIETIES: THE EXECUTIVE SECRETARY'S REPORT

1972-73 OFFICERS: President, J. Gregory Lynch (Harvard); Vice President, Marc R. Staenberg (Rutgers-Newark); Secretary, Sondra Lasky (Georgetown); Treasurer, Gary Rickner (Cumberland); Executive Secretary, Carol Per Lee Plumb.

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JOURNAL COMMITTEE CHAIRMAN: Stefan Lopatkiewicz (Harvard)

ASILS REPRESENTATIVE TO UNESCO: Jay A. Burgess

Internationalization of the organization, a long desired goal, became a reality this year as foreign participation in the Jessup Competition doubled, the Association welcomed its first member society from a law school outside the United States, and student societies were in the process of formation at schools in several other countries.

The Executive Committee devoted most of its attention to two tasks: (1) increasing funding efforts to meet the needs of the expanding organization; and (2) improving the administration of the burgeoning Jessup Competition. Restructuring the executive functions was also considered as the Executive Secretary's time was taken up more and more with running the Jessup Competition. The activities of the Association this year might be characterized, in short, as learning to cope with the problems of success.

ADVISORY BOARD

The first Advisory Board of the Association was appointed to implement an idea presented to the 1972 Executive Committee. The six members of the Board, all of whom are former officers of ASILS, proved to be an invaluable addition. Without exception, they maintained an active interest in the affairs of the student group; they were a source of both creative ideas and practical suggestions and were ever ready to provide a helping hand when the need arose. Their expertise will add much needed continuity to the administration of ASILS.

MEMBERSHIP ACTIVITIES

Interest in international law seems to be on the upswing in law schools across the country: almost every ASILS society reported a larger number of members than it had the previous year. Societies and their members engaged in a wide range of events tailored to the abilities,

resources, and incentives of their students. Many societies programmed ambitious symposiums. More than two-thirds of the fifteen Regional Meetings of the American Society of International Law held during the year had substantial student input.

Marc R. Staenberg prepared a detailed report of ASILS Regional Activities. Copies of his report were presented to members of the ASIL Executive Council to acquaint them with the enthusiasm and the range of activities of the younger members of the international law fraternity.

Communication between member societies and the hierarchy of ASILS left something to be desired. The Executive Secretary visited student societies in the Washington area, Chicago, and Boston, and was present at Jessup Regionals in Iowa City, Syracuse, and Washington. It is hoped that more funds will be available in future years so that one student officer can be present at each Jessup Regional.

The ASILS *Newsletter* was only issued twice as the Executive Secretary was overwhelmed by Jessup-directed tasks. Distribution of the editorial functions next year among the several student officers should enable the publication to return to its former bimonthly status.

NEW MEMBERS

In its tenth year of existence, ASILS proudly accepted its first foreign law school member as the Fortescue International Law Society became a provisional member. The Fortescue Society was organized by students from the University of Exeter who represented the United Kingdom in the Jessup semifinals at the 1972 Annual Meeting and became interested in ASILS as a result. This crowned the Association's vigorous effort to develop close ties with foreign law students through the medium of the Jessup Competition.

During the summer of 1972, Greg Lynch visited Argentina and actively assisted in the formation of a new student society at the National University of Rosario. Dr. Marcelo W. Miranda, the Argentinian Jessup Administrator, organized a conference on the law of the sea, which was held in Rosario. For the first time in the history of Latin American legal education, law students participated as colleagues: the panel of law students impressed the audience with their knowledge and sincerity. Plans for similar student participation are now in progress at two other South American universities.

Student international law societies which were voted into membership at the Annual Meeting were located at American University, DePaul University, Washington University, and West Virginia University. Elected to provisional membership were new societies at Maryland University and the University of Oklahoma.

THE 1973 JESSUP COMPETITION

Attracted by a timely law of the sea problem written by H. Gary Knight, Campanile Charities Professor of Marine Resources at Louisiana State

University, a total of 100 law schools from eleven countries took part in the Jessup International Law Moot Court Competition. For the first time, countries representing all five major continents participated. The problem raised very topical questions of fishing rights, scientific data collection, and the limits of territorial seas.

The dual league system established last year for the semifinals was continued. The winners of the seven U.S. Regional competitions competed in the National Round, while the winners of the ten foreign Regionals debated each other in the International Round. The countries competing in the 1973 Competition were: Argentina, Canada, Ethiopia, India, Liberia, The Netherlands, Nigeria, Singapore, the United Kingdom, and Zambia. These semifinal Rounds were held at the Georgetown University Law Center and were administered by Mr. Robert King and Mr. Ernest Sanchez, students at the school.

William O. Douglas, Associate Justice of the Supreme Court of the United States, served as chief judge of the Final Round. The other judges were H. E. Arvid Pardo, Minister of Oceanic Affairs for Malta and former Ambassador to Washington, and Professor Myres S. McDougal of the Yale Law School. The Final Round was held before an audience of over 500 people in the Statler-Hilton Hotel in Washington on April 14, 1973. The United States Information Agency televised the event for overseas broadcasting.

Under the direction of a student officer, Marc R. Staenberg, the Association had begun to build up a Jessup Prize List by actively soliciting awards. A dozen book publishers contributed book awards. The Rutgers International Law Society instituted a new Rutgers Trophy for the best memorial chosen from the memorial awards winners at the seven U.S. Regional Rounds. The University of Toronto contributed a trophy named in honor of the late Wolfgang Friedmann, which will be given annually to the winner of the Canadian Regional. It is hoped that additional awards will be added to the prize list in future years.

This year the Department of State generously granted all of the foreign participants a two-week post-Jessup tour of the United States. The U.S. team members were also invited to the Washington part of this program: a visit with former Chief Justice Earl Warren at the U.S. Supreme Court; a talk by the Acting Legal Adviser and a tour of the diplomatic reception area at the Department of State; and a tour of a Washington law firm.

The John Bassett Moore Society at the University of Virginia, Rutgers International Law Society in Newark, the Harvard International Law Society, and the Boston University International Law Society acted as hosts for visits of the foreign Jessup participants. During their busy two-week trip the students had a chance to attend typical law classes, meet faculty and students informally, visit trial courts, visit the historic sites of Monticello and Williamsburg, and had a special briefing at the United Nations.

The assistance of the Department of State and the Doherty Foundation to this year's Jessup Competition has been an asset that contributed immeasurably to the Competition's success. The International Law Sec-

tion of the ABA hosted a pleasant luncheon for the participants after the Final Round, which added just the right touch of festivity to the finale of the Competition.

JOURNAL COMMITTEE

With the commencement of publication this year of the *Journal of Space Law* at the University of Mississippi and the *Syracuse Journal of International Law*, the number of student-edited journals devoted to international legal topics rose to seventeen. At the fourth annual journal workshop the editors of nine of these publications met with students from several schools contemplating similar publications. The students felt the role of the Journal Committee, which had been set up during the year on an *ad hoc* basis, to be valuable in coordinating the efforts of the student publications, and a new Journal Committee Chairman was elected. Closer cooperation with the editors of the *American Journal of International Law* is also a goal for the coming year.

Throughout the year, the Executive Secretary distributed an up-to-date list of ASILS-affiliated journals at gatherings such as the Annual Meeting of the Association of American Law Schools, Regional Meetings of the ASIL, and Jessup Regional competitions. The staff of the *California Western International Law Journal* manned an ASIL-ASILS exhibit booth at the Western Political Science Association Convention in San Diego.

In honor of the contributions of the late Francis Déak to international law, Oceana Publications offered to institute an annual Déak Prize for the best article written by a student published in an ASILS-affiliated journal. Thanks to the prompt action of Journal Committee Chairman, Stefan Lopatkiewicz, in calling together a committee of student editors to read the initial nominations, and to the gracious assistance of Prof. Richard R. Baxter, who assembled a board of senior editors to make the final selection, the first Déak Prize was awarded at the 1973 Annual Meeting. Eleven journals nominated articles; those from Georgetown, Harvard, Vanderbilt, and Virginia were finalists. Mr. Allan R. Pearl, whose article, "Liberalization of Capital in Japan" appeared in the *Harvard International Law Journal*, was the winner of the Prize.

STUDENT INPUT INTO ASIL

Student membership in ASIL is now approximately 1119 or 20% of the total. Most students become involved in the workings of the Society as a result of encouragement by a faculty member or through their affiliation with a law school international law society.

The Society has responded by constantly seeking to involve wider student participation in its activities. There are 21 students serving on Society committees. Three students sit on Society study panels. At the 1973 Annual Meeting there were ten student rapporteurs and an ASILS-

sponsored panel on *The Practice of Transnational Law*, which aroused a great deal of interest.

NEW PROGRAMS

Member societies were urged to set up local law student speakers' bureaus, which would present international issues at appropriate levels to college, high school, and elementary school students. This program stems from an increasing awareness of the lack of understanding of foreign affairs among the general population and the need to impress the importance of these issues upon the average citizen at a young age. A film guide and list of film distributors was prepared and sent to all member societies as a useful program tool for working with younger students. More materials for this purpose are in the process of being collected for distribution to ASILS members.

Closer cooperation with local bar associations was sought. Greg Lynch prepared a letter urging cosponsorship of regional meetings on topics of international law, career opportunities programs, and speaker program series at a mutually convenient time and place for students and practitioners which was sent to the directors of all state bar associations.

STUDENT VOLUNTEER

Linda Lawrence, a student in the Foreign Policy Semester of American University, was appointed to do volunteer work for the Association as part of her course work. Linda participated in conferences at the State Department, observed the Society's study panels, did substantive research on private and public international legal issues, and was a bright, capable, and willing assistant in administering ASILS and the Jessup Competition. Her work with the Association strengthened her determination to go to law school. We hope for a continuing relationship of mutual benefit between the Society and the A.U. program.

CONCLUSION

From a loosely organized group of five student societies, the Association has grown in 10 years; it is now an organization of 64 member societies, 17 affiliated international law journals; its principal program, the Jessup Competition, has become increasingly popular as a worldwide legal training device of proven merit.

The Association is grateful to the many people who have made this growth possible. Without the dedicated efforts of the Executive Director of the Society, Stephen M. Schwebel, to secure funding, none of this expansion could have taken place. Lawrence Hargrove, Director of Studies; James A. R. Nafziger, Administrative Director; Anne P. Simons, Assistant Editor of *AJIL*; Marilou Righini, Editor of *International Legal Materials*; and other members of the Society's staff have all helped so

often and in so many ways that it is impossible to recount all of them in this space. Special thanks are due Mrs. Sarah R. Nagler, the Association's Secretary, and Mr. Demetrice McCoy, the Mailroom Manager, for their devoted support in overcoming truly astounding workloads. The countless faculty advisors of ASILS member societies, the unsung and overworked heroes who serve as Regional Administrators for the Jessup Competition, have all earned our thanks many times over.

The expansion of the Association reflects the professionalism of today's law students, their seriousness of purpose, and their determination to do something about contemporary international legal issues in a constructive manner. It is a challenge to serve these highly qualified, aware young people. We feel confident that the Association will rise to the challenge and embark on a new decade of participation in building a legal framework for world order.

Respectfully submitted,

CAROL PER LEE PLUMB
Fellow of the Society 1972-73

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CONSTITUTION
OF
THE AMERICAN SOCIETY OF INTERNATIONAL LAW *

*(Adopted by the incorporated Society April 28, 1951;
as amended to May 1, 1973)*

ARTICLE I

Name

This Society shall be known as The American Society of International Law.

ARTICLE II

Object or purpose

The object of this Society is to foster the study of international law and to promote the establishment and maintenance of international relations on the basis of law and justice. For this purpose it will co-operate with similar societies in this and other countries.

ARTICLE III

Membership

New members may be elected by the Executive Council acting under such rules and regulations as it may prescribe.

Annual Members. Annual members may be divided into such classes and shall pay such dues as the Executive Council shall determine and shall thereupon become entitled to all privileges of the Society including copies of the *American Journal of International Law* issued during the year. Upon failure to pay dues for one year a member may in the discretion of the Executive Council be suspended or dropped from membership.

Life Members. Upon payment of such amount as the Executive Council shall determine, any person eligible for annual membership may be elected by the Executive Council a life member and shall be entitled to all the privileges of annual members.

Members Emeriti. Persons who shall have completed fifty years of membership in the Society may thereafter be declared by the Executive Council *members emeriti* and thereupon shall be entitled to all the privileges of the Society without payment of dues.

Honorary Members. Persons not citizens of the United States, who shall have rendered distinguished service to the cause which this Society is formed to promote, may upon nomination of the Executive Council be

* The history of the origin and organization of The American Society of International Law can be found in the PROCEEDINGS of the First Annual Meeting at 23. The original Constitution was adopted January 12, 1906.

elected to honorary membership by the Society. Only one honorary member may be elected in any one year. Such members have the full privileges of life membership but pay no dues.

Corporate Non-Voting Members. Upon payment of such annual dues as the Executive Council shall determine, corporations, partnerships, associations, and organizations of such other kinds as the Executive Council may designate, may be elected members of the Society without the privileges of voting or holding office but with all the other privileges of membership including receipt of the Society's publications.

Additional Classes of Membership. The Executive Council may establish additional classes of membership upon such terms and with such dues as it shall determine.

ARTICLE IV

Officers

The officers of the Society shall consist of an Honorary President, a President, such number of Honorary Vice Presidents as may be fixed from time to time by the Executive Council, four Vice Presidents, a Secretary and a Treasurer, all of whom shall be elected annually, but the President shall not be eligible for more than three consecutive annual terms.

The Secretary and the Treasurer shall be elected by the Executive Council. The Executive Council may appoint an Assistant Treasurer, who shall perform the duties of the Treasurer in the event of his absence or incapacity to act. All other officers shall be elected by the Society except as hereinafter provided for the filling of vacancies occurring between elections.

Candidates for all offices to be filled by the Society at each annual election shall be placed in nomination either by a petition signed by not less than twenty members of the Society and submitted at least ninety days in advance of the annual meeting or on the report, submitted at least one hundred and eighty days in advance of the annual meeting, of a Nominating Committee, which shall consist of the five members receiving the highest number of ballots at the business session of the preceding annual meeting of the Society. Nominations for membership on the Committee may be made by the Executive Council or on the floor.

For all offices as to which there is no nomination by petition, election shall be by a single ballot cast by or on behalf of the Secretary of the Society at the business session of the annual meeting. In the event that there is a nomination by petition for any office, that office shall be filled at the annual meeting by a majority vote of the members of the Society, voting either in person or by a postal ballot mailed to the members of the Society at least sixty days before the annual meeting. All officers shall serve until their successors are chosen. The Council may fill vacancies until the next annual meeting of the Society.

ARTICLE V

Duties of Officers

The President shall preside at all meetings of the Society; shall appoint committees, except as otherwise determined by the Executive Council; and

shall perform such other duties as the Executive Council may assign to him. The Executive Council may designate one of the Vice Presidents to serve as Executive Vice President, who shall have responsibility for general executive direction of the Society and shall perform such other duties as the Executive Council may assign him. In the absence of the President his duties shall devolve upon one of the Vice Presidents to be designated by the President, or, if there be no President, or if the President be unable to act, by the Executive Council.

The Secretary shall keep the records and conduct the correspondence of the Society and shall perform such other duties as may be assigned to him by the Society or by the Executive Council.

The Treasurer shall receive and have the custody of the funds of the Society and shall invest and disburse them subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of April.

The officers shall perform the duties prescribed in Article VI or elsewhere in this Constitution.

ARTICLE VI

The Executive Council

There shall be an Executive Council herein termed the Council. The Council shall have charge of the general interests of the Society and shall possess the governing power except as otherwise specifically provided in this Constitution. The Council shall adopt regulations consistent with this Constitution, appropriate money, and have power to arrange for the issue of publications. The Council shall appoint committees in those cases in which it has reserved that power to itself.

The Council shall consist of the officers of the Society and twenty-four elected members whose terms of office shall be three years. Eight members shall be elected by the Society each year according to the same procedure prescribed for the nomination and election of officers of the Society under Article IV of this Constitution. The service of Council members shall begin at the meeting of the Council immediately following the meeting of the Society at which they are elected. The terms of office and the Council members already elected for those terms at the time this Constitution is revised shall continue unchanged. Elective members of the Council shall be eligible for re-election. Following service for two consecutive terms no elective member shall be eligible for re-election until at least one year after the expiration of his second consecutive term. The Council shall have power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or for other causes. Such appointees shall hold office until the next annual election.

The President of the Society shall be the Chairman of the Council. In case of his absence the Council may elect a temporary chairman.

The Secretary of the Society shall be the Secretary of the Council. He shall keep the records and conduct the correspondence of the Council and shall perform such other duties as may be assigned to him by the Council.

Seven members shall constitute a quorum and a majority vote of those present shall be necessary for decisions.

Meetings of the Council shall be called by the Secretary on instructions of the President, or of a Vice President acting for the President, or upon the written request of seven members of the Council.

ARTICLE VII

Meetings

Annual meetings of the Society shall be held at a time and place to be determined by the Executive Council. The chief purpose of the meetings is the presentation of papers, and discussions. The Society shall also elect officers and transact such other business as may be necessary.

Special meetings may be held at any time and place on the call of the Executive Council, or of the Secretary upon written request of thirty members. At least ten days' notice of a special meeting shall be given to each member of the Society by mail, such notice to specify the object of the meeting. No other business shall be transacted at such meetings unless admitted by a two-thirds vote of those present and voting.

Fifty members shall constitute a quorum at all meetings and a majority of those present and voting shall be necessary for decisions.

ARTICLE VIII

Resolutions

All resolutions relating to the principles of international law or to international relations which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon. Resolutions may be submitted for consideration by the Executive Council in advance of any meeting of the Society by depositing them with the Secretary in due time.

ARTICLE IX

Amendments

This Constitution may be amended at any annual meeting of the Society by a two-thirds vote of the members present and voting. Amendments may be proposed by the Executive Council. They may also be proposed through a communication in writing signed by at least five members of the Society and deposited with the Secretary within ten months after the previous annual meeting. Amendments so deposited shall be reported upon by the Council at the next annual meeting.

All proposed amendments shall be submitted in writing to the members of the Society at least ten days before the meeting at which they are to be voted upon. No amendment shall be voted upon until the Council shall have made a report thereon to the Society.

REGULATIONS
OF
THE AMERICAN SOCIETY OF INTERNATIONAL LAW, A CORPORATION

(Adopted April 28, 1951; amended to May 1, 1973)

SECTION I. REGULATIONS ON MEMBERSHIP

1. Any person of good moral character, or organization acceptable to the Executive Council, interested in the objects of the Society may be admitted to membership in the Society.

2. There shall be the following classes of Annual Members: *

(a) *Regular Members.* Persons eligible for membership not coming within any of the special categories set out below shall be Regular Members. Regular Members resident in the United States shall pay annual dues of \$25, and non-resident Regular Members, dues of \$15.

(b) *Intermediate Members.* Persons eligible for membership who are under 30 years of age at the time of application for membership may be admitted as Intermediate Members and shall pay annual dues of \$15 for the first 5 consecutive years of membership.

(c) *Professional Members.* Persons eligible for membership who are residents of the United States and are primarily engaged in the practice of law and have been members of the Bar for over ten years shall be Professional Members and shall pay annual dues of \$40. Other members, resident or non-resident, admitted to practice may, in their option, become Professional Members and shall pay annual dues of \$40.

(d) *Contributing Members.* Any individual member may become a Contributing Member for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$50.

(e) *Supporting Members.* Any individual member may become a Supporting Member for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$100.

(f) *Student Members.* Persons eligible for annual membership who submit with their applications satisfactory evidence that they are properly qualified graduate or undergraduate students in an institution of higher learning may become Student Members with annual dues of \$7.50. Student membership is valid for one year after the conferring of this membership. Such membership may be renewed from time to time at the discretion of the Executive Director on receiving satisfactory evidence that the person is still regularly enrolled as a student in an institution of higher learning.

3. Any corporation, partnership, association, or other organization acceptable to the Executive Council is eligible for corporate membership for each year in which it pays annual dues of \$1,000 or more.

* Amendment of Sub-sec. 2(a) of Section I effecting changes in dues for non-resident Regular Members is effective January 1, 1974.

4. There shall be the following further classes of members who shall not be required to pay annual dues:

(a) *Life Members.* Individual members, or individuals eligible for membership, may become Life Members upon payment to the Society of \$1,000.

(b) *Members Emeriti.* Members of the Society shall be Members *Emeriti* upon completion of fifty years of membership in the Society.

(c) *Honorary Members.* Persons not citizens of the United States, who shall have rendered distinguished service to the cause which this Society is formed to promote, may upon nomination of the Executive Council be elected to honorary membership by the Society. Only one Honorary Member may be elected in any one year. Such members have the full privileges of life membership.

5. There shall be the following classes of Patrons:

(a) *Patrons of the Society.* Upon donation of at least \$5,000 in a single amount, or in contributions since January 1, 1961, in excess of dues aggregating at least \$5,000, or upon filing with the Executive Council satisfactory evidence establishing that the Society has been irrevocably made the beneficiary of such a sum, any individual member or individual eligible for membership may be elected by the Executive Council as a Patron of the Society and shall have the full privileges of life membership. As a token of its appreciation, the Society shall list the names of its Patrons in each issue of the *American Journal of International Law*. A Patron of the Society shall continue to be indicated as such after his death.

Upon the donation of at least \$5,000 in the name of a deceased person who was a member of the Society or was eligible for membership, the Executive Council may declare such person to be a Patron of the Society posthumously. As a token of its appreciation, the Society shall list the names of such Patrons in each issue of the *American Journal of International Law* under the heading, "In Memoriam."

(b) *Annual Patrons.* Any member of the Society or any individual eligible for membership may become an Annual Patron for each year in which he contributes to the Society an amount which, with his annual dues, comes to at least \$500. An organization eligible for membership may become an Annual Patron for each year in which it contributes at least \$500.

6. An appropriate application shall be submitted on behalf of each new member except an Honorary Member or a Patron.

7. The Executive Director shall add the name of the new member to the roster of members, subject to review by the Executive Council at its next meeting. If the Executive Director sees fit, he may refer the application to the Executive Council and not add the name of the applicant to the roster of members until after favorable action shall have been taken by the Executive Council.

8. A member may transfer his membership from one classification to another upon complying with applicable requirements.

9. Dues shall be payable in January of each year. Upon failure to pay dues before the end of June of the year in which they are payable, any member subject to the obligation to pay dues shall be suspended from membership. If, after such further dues notices during the course of the year as the Executive Director deems appropriate, the member has not paid his dues, the Executive Director shall remove the name of the delinquent from the membership roll. The action of the Executive Director shall be subject to review by the Executive Council at its next meeting.

10. Any individual or organization admitted to membership whose conduct does not conform to the requirements for membership may be suspended or dropped from membership by the Executive Council.

11. All members and patrons in good standing shall be entitled to receive the *American Journal of International Law*, including the *Proceedings* (corporate members being entitled to receive five copies of each).

12. Only natural persons may be voting members.

SECTION II. REGULATIONS ON EXECUTIVE COUNCIL, EXECUTIVE COMMITTEE, AND BOARD OF REVIEW AND DEVELOPMENT

1. The Executive Council (herein termed the Council) during the intervals between its meetings shall function through an Executive Committee consisting of the President, Executive Vice President, Treasurer, and seven other members of the Council elected annually by the Council.

2. The Executive Committee may appropriate money only within the regulations pertaining to budget and finance.

3. There shall be established a Board of Review and Development which shall, if possible, meet several times a year to review current developments in law affecting public and private relations and transactions across national boundaries and current research and similar activities in these fields, seek to identify problems that in their judgment require further intensive study, organize such further study through committees (assisted where appropriate by rapporteurs and research assistants) or individual research, recommend the allocation of funds made available for these purposes from grants or other sources, and recommend the publication of papers resulting from its work. The Board shall consist of the incumbent President, his two immediate predecessors as President, the Executive Director, and the Editor-in-Chief of the *American Journal of International Law*, all serving *ex officio*, and fifteen other members whose terms shall be five years and who shall normally be ineligible to succeed themselves. At least three of the members shall be selected as persons known for their contributions to disciplines other than law. The Board shall, with the consent of the Executive Council, appoint new members to serve full terms or to fill vacancies in unexpired terms.

SECTION III. REGULATIONS ON COMMITTEES

1. *General.* The standing committees of the Society, which may function through subcommittees, shall be those described below. With the consent of the Executive Council the President may appoint and dissolve

additional standing committees to deal with substantive problems. All committees shall make annual reports to the President for transmittal to the Executive Council and the Society, and such interim reports as the President or Executive Council may request. Standing committees except the Nominating Committee shall be appointed by the President and, unless otherwise specified, shall be advisory to the President, the Executive Council, and the Society. The President may appoint and dissolve *ad hoc* committees.

2. *Committee on the Budget.* The Committee on the Budget shall advise the Treasurer concerning the investment of the funds of the Society, provide for the annual audit of the financial transactions of the Society and of the books and records pertinent thereto, and advise concerning the ways and means of providing for the financial needs of the Society. The Committee on the Budget shall also advise concerning the equipping and maintaining of the Society's headquarters offices, the preparation of the annual budget, expenditures, and all other matters concerning the administration of the Society's business affairs.

3. *Committee on Corporate Membership.* The Committee on Corporate Membership shall advise concerning ways and means of supplementing the revenues from individual membership dues and from subscriptions. The committee may solicit contributions, including corporate memberships, in support of the general activities of the Society or intended to carry out specific activities in any form agreeable to the donor and consistent with the policies laid down by the Executive Council.

4. *Committee on Financing and Endowment.* The Committee on Financing and Endowment shall advise concerning ways and means of increasing the Society's revenues from foundations and other non-profit institutions, and shall assist the President and the Executive Director in securing grants from such institutions.

5. *Committee on the Annual Meeting.* The Committee on the Annual Meeting shall arrange the program of subjects and speakers for the annual meetings. The committee is authorized to limit the length of papers and speeches.

6. *Committee on Regional and Local Activities.* The Committee on Regional and Local Activities shall promote the organization of regional and local committees in appropriate localities in the United States and assist the regional and local committees to arrange meetings and other activities. The committee may advise the President on contributions to assist such meetings and other activities from funds designated for that purpose in the Society's budget.

7. *Committee on Membership.* The Committee on Membership under the direction of the Executive Council shall by correspondence or other means seek to enroll in the Society persons interested in the activities and purposes of the Society. For this purpose it shall approach members of the legal and teaching professions, diplomatic and government officials, and other groups, so as to obtain the widest membership. The committee's

activities shall also include the extension of the *American Journal of International Law* through subscriptions.

8. *Committee on Student and Professional Development.* The Committee on Student and Professional Development shall promote the interest of the Society in education and professional development in the field of international law and in the education of the public at large. The Committee shall examine educational programs in international law and related subjects and shall make suggestions for their improvement, propose educational and professional activities in which members of the Society might participate, and be available to provide counsel to student international law societies and other groups.

9. *Committee on the Library.* The Committee on the Library shall advise on general policy regarding the library of the Society.

10. *Committee on Tillar House.* The Committee on Tillar House shall advise on the maintenance and use of Tillar House and its furnishings. It may make recommendations to the Executive Council concerning memorials within the House.

11. *Committee on Selection of Honorary Members.* The Committee on Selection of Honorary Members shall recommend to the Executive Council for nomination as an honorary member of the Society a person not a citizen of the United States who has rendered distinguished service in the field of international law proper, namely, one who has made contributions to the science or the history of international law.

The committee shall file its report with the Executive Director of the Society at least three weeks prior to the annual meeting; the report shall state the qualifications upon which the recommendation of the committee is based, and shall within two weeks be sent to each member of the Executive Council for his consideration.

12. *Committee on Annual Awards.* The Committee on Annual Awards shall be responsible for recommending to the Executive Council of the Society not later than March 15 of each year the name of an author (or names if it be a collective authorship) of a work (in the form of a book, monograph, or article) in the field of International Law, which the committee feels deserves the award of the Certificate of Merit of The American Society of International Law. In making its recommendations it shall observe the following rules:

(a) The competition for the award is open to all regardless of nationality or the language or place of publication of the work.

(b) Works to be considered for the award must have been published within a twenty-four-month period preceding February 1 of the year in which the award is to be made.

(c) The author or his publisher shall forward to the Executive Director of the Society, for the committee's use, at 2223 Massachusetts Avenue, N.W., Washington, D. C. 20008, before February 1 of each year not less than three copies of any work which the author or publisher wishes considered for the award.

(d) The committee shall not limit its consideration to works filed with the Executive Director of the Society in accordance with the provisions of paragraph (c) hereof, but may take notice of any other works which shall have been published during the twenty-four-month period preceding February 1 of the year in which the award is to be made.

(e) A majority vote of the committee is sufficient to support recommendation of a work to the Executive Council of the Society. The Executive Director of the Society shall forward the committee's recommendation to the members of the Executive Council. Should there be a dissenting opinion from the committee, the Executive Director of the Society, when forwarding the committee's recommendation, shall set forth the principal arguments of the majority and minority opinions of the committee. A majority vote of the Executive Council at a meeting of the Council shall be decisive as to its recommendation to the Society.

(f) In the event that no two members of the committee can agree on a work published during the period concerned as being sufficiently outstanding to merit the award of the Society, the committee may consider any work in the field of International Law published during a thirty-six-month period preceding February 1 of the year in which the award is to be made. In the event that no work published within such a period meets the standards of the committee, the Chairman shall so report to the Executive Council of the Society, and no award shall be made at the annual meeting of the Society for the year concerned.

(g) The award, if any there be, shall be conferred by the President of the Society in the name of the Society after the approval of the recommendation of the Executive Council by the Society at the annual meeting.

(h) The award shall consist of a framed certificate appropriately printed.

(i) The making of such award by the Society shall not constitute, nor be construed as constituting, adoption by the Society of the views of the author of any work receiving the award.

13. *Committee on the Manley O. Hudson Medal.* The Committee on the Manley O. Hudson Medal shall recommend to the Executive Council from time to time for nomination as a recipient of the gold medal established in the name of the Society by Ralph G. Albrecht a distinguished person of American or other nationality who has contributed to the scholarship and achievement of his time in international law.

A certificate reciting the achievements of the recipient shall be presented with each medal.

The committee shall report at each annual meeting of the Society and recall the terms of the gift, even though no recommendation of an award is made for that year.

14. *Committee on Publications of the Department of State and the United Nations.* The Committee on Publications of the Department of State and the United Nations shall promote the interests of the Society in making avail-

able for educational, professional, and historical purposes, in permanent and accessible form, official texts of treaties and treaty information, diplomatic correspondence, and other documentary material relating to international law and international relations. The committee is authorized to represent the Society, orally or in writing, before appropriate government officials or bodies, on matters within the jurisdiction of the committee and to cooperate with committees of other societies interested in the same purposes.

15. *Nominating Committee.*

(a) The Executive Council, advised by the President, shall make nominations for the Nominating Committee at its meeting next prior to the business session of the annual meeting. Members of the Nominating Committee shall serve through the business session of the next annual meeting.

(b) The Nominating Committee shall draw up a slate of candidates for all elective offices, which shall be notified to members of the Society at least one hundred and fifty days in advance of the annual meeting through suitable publications.

(c) The Nominating Committee shall notify candidates for membership on the Executive Council that the three-year term of the office for which they are nominated begins immediately after the business session of the annual meeting at which the election takes place.

SECTION IV. REGULATIONS ON MEETINGS OF THE SOCIETY

1. *Annual Meetings*

(a) The Executive Council shall determine the time and place for the annual meetings of the Society, which shall be held, if possible, in the same place where arrangements are made for holding the annual banquet.

(b) No paper prepared for delivery at an annual meeting of the Society shall be read at such meeting by any person except the writer thereof, unless there be a special resolution of the Executive Council authorizing its reading in the writer's absence. With the exception of those papers for which special authority is given for their reading by some other person, all papers which the authors are unable to read shall be read simply by title.

(c) The printed programs of the Society's meetings shall bear the Seal of the Society and carry the standing committees of the Society.

(d) Any notice published in the *Journal* shall constitute due notice to all members of the Society.

2. *Regional Meetings.* There may be held from time to time, without modifying the program of annual meetings of the Society, regional meetings to discuss problems of international law and relations. Such regional meetings shall be organized by groups of members of the Society, under a regional director appointed for the purpose, in the locality where held, and shall be open to the public if the members so decide. No Society business shall be transacted at such meetings, and no regional meeting shall take any action binding upon the Society.

SECTION V. REGULATIONS ON PUBLICATIONS

1. *American Journal of International Law*

(a) The Society shall publish as its official organ a periodical entitled *The American Journal of International Law*.

(b) The publication of the *Journal* shall be under the direct supervision of the Editor-in-Chief, who shall have authority in his discretion to make appropriate arrangements with publishers regarding the printing of the *Journal*.

(c) The editing and publication of the *Journal* shall be subject to the following rules and regulations:

(1) There shall be a Board of Editors charged with the general supervision of editing the *Journal* and determining general matters of policy in relation thereto.

(2) The Board shall consist of twenty-four elected members whose terms of office shall be four years. Six members shall be elected by the Executive Council each year, at its meeting next prior to the business session of the annual meeting, from among the members of the Society who have capacity for scholarly production and whose availability and probability of activity qualify them for useful membership on the Board. A member of the Board of Editors who has served on the Board for twelve years after the first election held under the procedures prescribed in this Regulation, as amended, shall not be eligible for election to the Board for one year after the expiry of his term of office. The Executive Council shall have power to elect persons to fill out the unexpired terms of members of the Board of Editors who die, resign, or are unable to serve for any other reason.

At the time of its first election under the procedures prescribed in this Regulation as amended, the Executive Council shall designate which members of the Board of Editors shall serve for one, two, three, and four years respectively.

(3) Membership upon the Board of Editors shall involve, in addition to the duties otherwise prescribed herein, obtaining articles and other material for publication, the preparation of contributions, especially editorial comments and book reviews, and the examination of and giving advice upon the suitability for publication of articles submitted to the *Journal*.

(4) There shall be an Editor-in-Chief whose term of office shall be four years. The Executive Council shall, when a vacancy occurs, elect the Editor-in-Chief from among the members of the Board at the meeting of the Executive Council next prior to the business session of the annual meeting. The Editor-in-Chief shall call and preside at all meetings of the Board of Editors, and when the Board is not in session he shall determine matters of policy regarding the contents of the *Journal*. The Executive Council may establish an honorarium to be paid to the Editor-in-Chief and may reimburse him for the expenses incurred in the performance of his duties. In the event of the temporary inability of the Editor-in-Chief to serve, his duties shall be performed by one or more of the editors to

be designated by him or by the other members of the Board, who may be likewise compensated and reimbursed.

(5) The staff of the Society shall include an Assistant Editor, who shall be appointed and whose duties shall be determined in co-operation with the Board of Editors; editorial duties in connection with the *Journal* shall be formulated exclusively by the Board of Editors.

(6) The Executive Council may elect annually as honorary members of the Board of Editors present or former members of the Board of long service who have reached the age of sixty-five. Such honorary members shall be in addition to the membership of the Board provided for in paragraph (c) (2) hereof. They shall continue to exercise such editorial functions as they may wish to perform, subject to all other regulations herein prescribed.

(7) The *Journal* shall include leading articles, editorial comments, notes, judicial decisions involving questions of international law, book reviews and notes, a list of books received, and a section of official documents.

(i) Before publication all articles shall receive the approval of two members of the Board. In case an article is rejected by one editor, the question of its submission to another editor shall be decided by the Editor-in-Chief.

(ii) Editorial comments must be written and signed by the members of the Board of Editors, and shall be published without submission to any other editor, except that they shall be governed by the provisions of paragraph (c) (8) hereof.

(iii) The department of judicial decisions shall be made up of summaries of judicial decisions rendered by courts in the United States and elsewhere, including international tribunals, extracts from decisions deserving quotation at some length, and the full texts of any decisions meriting such treatment.

(8) The *Journal* shall be published on the 15th day of January, April, July, and October, or as near those dates as possible. The final make-up of each number shall be submitted to the Editor-in-Chief, who shall have the power to veto the publication of any contribution or other material. The Assistant Editor shall proceed, subject to these regulations, with the publication of the *Journal* at such times as may be necessary to insure its appearance on the publication date.

2. *Annual Proceedings*

(a) The Society shall also publish yearly the proceedings of its annual meetings. The *Proceedings* shall be published on the 15th day of August or as soon thereafter as possible, and for this purpose there shall be set a time limit within which papers for publication in the *Proceedings* shall be received.

(b) The *Proceedings* shall contain an account of the principal papers read, addresses delivered, and discussion had at the annual meetings, the minutes of the business meeting of the Society, other important reports,

and an adequate index. The Executive Director shall be responsible for the editing and publication of the *Proceedings*.

3. *International Legal Materials*

(a) The Society shall publish, once every two months, a collection of current documents involving the international aspects of law, entitled "International Legal Materials," including recent legislation and regulations, treaties and agreements, briefs and decisions in judicial proceedings, official reports, and other official documents from the United States, other countries, and international organizations.

(b) The publication of *International Legal Materials* shall be under the direct supervision of an Editor, appointed by the Executive Council, who shall have authority to designate assistant editors, and, within the limits of funds budgeted for the publication by the Council, to make appropriate arrangements for publication and distribution and to pay reasonable honoraria to translators of documents for publication.

(c) There shall be an Editorial Advisory Committee to advise on editorial policy and the selection of documents for publication.

(1) The Editorial Advisory Committee shall consist of twelve elected members whose terms of office shall be three years. Four members shall be elected by the Executive Council each year, at its meeting next prior to the business session of the annual meeting. Members shall be nominated by the Editorial Advisory Committee, which shall take into account both the professional qualifications of nominees and their ability to take part in meetings in Washington without substantial expense to the Society or burden to the Committee's members. Any member of the Executive Council may also put candidates in nomination.

At the time of its first election under the procedures prescribed in this regulation, the Executive Council shall designate which members of the Editorial Advisory Committee shall serve for one, two, and three years respectively.

(2) The Executive Director and the Director of Studies shall also serve *ex officio* as members of the Editorial Advisory Committee.

4. *Subscription Rates*

The Executive Council shall determine the rates of subscriptions and the terms and conditions under which the *Journal* and other publications shall be distributed to subscribers and others.

SECTION VI. REGULATIONS ON THE OFFICE OF EXECUTIVE DIRECTOR

1. There shall be an Executive Director appointed by the Executive Council to serve for such term as the Executive Council shall from time to time prescribe.

2. The Executive Director shall devote the major part of his time to the work of the Society, shall assist the President in the performance of his duties, shall assist the committees of the Society in carrying out their functions, and shall perform such other duties as may be assigned to him by the Executive Council. Among other duties, the Executive Director, in con-

sultation with appropriate committees, shall make recommendations to the President and Executive Council concerning the composition of the staff, program, and budget of the Society and shall make an annual report.

3. The Executive Director shall appoint the staff of the Society, whose duties and terms of service he shall determine within a staffing pattern and budget authorized by the Executive Council. Within the approved budget, he may appoint temporary consultants or employees to assist in the execution of his duties.

4. The Executive Director shall receive notice of all meetings of the Executive Council, the Executive Committee, and all committees of the Society.

5. It shall be the duty of the Executive Director to attend meetings of the Executive Council and Executive Committee of the Society (except when the conduct of his office and terms of his appointment are considered).

6. The Executive Director may attend the meetings of all committees of the Society.

7. The position of Executive Director may be held by an elected officer of the Society, who may be designated Executive Vice President.

SECTION VII. REGULATIONS ON THE OFFICES OF THE SOCIETY

1. The Society shall maintain an office in the District of Columbia as its principal office and may maintain offices in such other places as may be determined by the Executive Council from time to time.

2. The office of the Society in the District of Columbia shall be under the immediate direction and supervision of the Executive Director.

SECTION VIII. REGULATIONS ON BUDGET AND FINANCE

1. The expenditures of the Society shall be regulated by the annual budget adopted by the Executive Council, apart from expenditures, funded by grants to the Society, for the Society's program of research, study and publication which are authorized by the Board of Review and Development. Appropriations for those expenditures from such grants shall be made by the Executive Committee. The Executive Director, under the direction of the President and in consultation with the Editor-in-Chief of the *Journal*, the Treasurer, and the Committee on the Budget, and such other committees as may be appropriate, shall prepare the proposed annual budget for submission to the Executive Council.

2. The proposed annual budget shall include estimates of the main items of expenses by major categories, including the staff, the *Journal*, other publications, library, maintenance of the headquarters, supplies and equipment, travel, meetings, and consultants. The annual budget as approved by the Executive Council shall regulate all expenditures for the fiscal year concerned, subject to the provisions of Regulation 1 of Section VIII. When significant variations in the budget develop or appear likely to develop, the Executive Director shall consult with the President, the Treasurer, and the Chairman of the Committee on the Budget. With the concurrence of the

President, the Treasurer, and the Chairman of the Committee on the Budget, additional obligations not exceeding the Society's income for the current fiscal year may be incurred for items already budgeted (other than salaries), if the interests of the Society require.

3. On behalf of the Society, the Executive Council may receive gifts or grants limited by the donor for specific purposes outside the regular budget and authorize expenditure of such gifts or grants, delegating such responsibility as it shall consider appropriate to the officers and Executive Director.

4. The Executive Director, or in his absence or disability such other person as the President or Executive Council may designate, shall be authorized to incur obligations on behalf of the Society within the total authorized for expenditure in accordance with these Regulations.

5. *Reserve Funds.* Funds not currently needed for expenditures under the approved annual budget and any other funds, except the investment fund provided by Regulation 6 of this Section, shall be kept by the Treasurer, at his discretion, in Federally insured savings accounts, or shall be invested by him in stocks or securities. The Treasurer may transfer from such savings accounts or investments to the checking account or accounts funds required to meet expenditures authorized by the approved annual budget.

6. *Investment Fund.* The Treasurer shall invest all payments received pursuant to Regulation 4 (a) of Section I and keep the same as a permanent fund, the income from which shall be devoted to the interests of the Society. To the extent practicable, he shall keep such funds invested in stocks and securities. He is authorized, in his discretion, to sell any stocks and securities which are now or may become part of the investment fund and to reinvest the proceeds. He may keep a reasonable amount in Federally insured savings accounts.

7. *Checking Accounts.* The Treasurer shall maintain one or more checking accounts in a bank or banks approved by the Executive Council, in which funds of the Society which are not deposited or invested under Regulations 5 and 6 of this Section regarding reserve and investment funds shall be deposited and kept, subject to checks drawn in the name of the Society by its Treasurer, Assistant Treasurer, Executive Director, Director of Studies, or the Chairman of the Committee on the Budget. Any check so drawn by the Executive Director or the Director of Studies shall bear the countersignature of the Treasurer, the Assistant Treasurer or the Chairman of the Committee on the Budget if the amount thereof is greater than \$500.00. The Executive Director shall promptly at the end of each month communicate to the Treasurer a memorandum of all deposits in and withdrawals from the account during the month.

8. *Safe Deposit Box.* The Treasurer is authorized and directed to contract in the name of the Society for continued use of a suitable safe deposit box in a bank in Washington, D. C.

It shall be provided in and by such contract that access to the contents of such box may be had only by not less than any two of the incumbents for the time being of the office of President, of Treasurer, of Assistant Treasurer, and of Secretary, or by the Treasurer or Assistant Treasurer and any one of the members of the Committee on the Budget. The Secretary shall immediately after adjournment of the annual meeting certify to the bank in which the safe deposit box is located, under seal of the Society and countersignature of the President, the names of the incumbents of each of the above-mentioned offices and of the members of the Committee on the Budget.

Such certificate shall be accompanied by all requisite signature or other cards of identification.

9. The Treasurer, Assistant Treasurer, or Chairman of the Committee on the Budget is each authorized to pay bills approved by the Executive Director, or in case of the absence or disability of the Executive Director, such other person as the President or Executive Council may designate, within the total authorized for expenditure in accordance with these Regulations. The Executive Director or, in his absence or disability, the Director of Studies, is authorized to pay bills not exceeding \$500.00 in amount and within the total authorized for expenditure in accordance with these Regulations.

10. The Treasurer shall submit such financial reports as the Executive Council shall request. He shall also submit an annual financial report to the Society at the annual meeting, which shall be accompanied by a detailed statement of all expenditures of the Society from whatever account.

11. The Treasurer shall submit such periodic financial reports as may be required by persons or institutions making grants or gifts to the Society, or by agencies of the Federal, State, or municipal governments.

12. The Assistant Treasurer shall perform all the functions described above in case of the absence or disability of the Treasurer, and may at any time and from time to time perform any of said functions upon being thereunto authorized and directed by the Treasurer.

SECTION IX. REGULATIONS ON NUMBER OF HONORARY VICE PRESIDENTS

The number of Honorary Vice Presidents shall be eighteen.

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Abbreviations: ECE, United Nations Economic Commission for Europe; GA res., United Nations General Assembly resolution; ICJ, International Court of Justice; OAS, Organization of American States; OAU, Organization of African Unity; OPEC, Organization of Petroleum Exporting Countries.

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